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POLITICAL SCIENCE QUARTERLY

OUR MONETARY EQUILIBRIUM[1]

TWO months ago a political convention met in this city to nominate candidates for president and vice-president, and after struggling a day and a night over the monetary plank of its platform, it decided to say nothing whatever on the subject. This action was equivalent to saying that the standard of value is no longer a matter of dispute. Monetary equilibrium has returned to us after a disturbance of more than forty years. This is merely saying that mental equilibrium has been restored on the subject of money, for the disturbance has been psychological and sociological rather than economical. Every person in his individual capacity, in his own *οἰκονομία*, has always preferred gold to irredeemable paper; but multitudes in their collective capacity have preferred the latter to the former and by carrying this preference into their political action caused the disturbance. The dispute has been a difference of opinion as to the meaning of the word dollar, some holding that it signified a fixed quantity by weight of the metal gold, while others contended that it meant also the government's stamp impressed upon various things.

In this prolonged contest the borrowing and lending sections of the Union were arrayed on opposite sides, as was shown by the votes which they cast. The states having a relatively dense population and concentration of capital adhered to the gold standard. They accepted irredeemable paper as a temporary necessity, but were inflexibly opposed to any lasting change in the definition of the dollar. Those states in which contrary conditions prevailed

[1] Read before the Section of Economics, International Congress of Arts and Science, Universal Exposition, St. Louis, Sept. 24, 1904.

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were in favor of cheaper materials for the making of money, because they thought that money would thus be more easily obtainable. A relatively small number of instructed persons, not belonging to any particular section or party but distributed among all, held a balance of power and a preponderating influence. In all the vicissitudes of the contest they were able to count upon the executive branch of the government, which held the legislative branch in check on some critical occasions.

The legal tender act of 1862, an incident of the Civil war, first unsettled people's minds on the question: what is a dollar? There was no such question under debate previously. We had had controversies in plenty about bank notes, but nobody had imagined that a piece of paper was real money or could ever be made such. The distinction between paper promises and real money was sharply defined and was kept alive by frequent bank failures and by the numerous "bank-note reporters," which were used in business circles to distinguish between notes that were at par and those that were at a greater or less discount.

In 1862 there came into the hands of the people a new kind of paper currency called greenbacks, which seemed to be at par, although they were actually at a discount. The average citizen, unless he was a dealer in money or was engaged in foreign trade, did not observe the discount. He perceived that the greenbacks would pay his debts and buy the things he wanted. If the prices of commodities were somewhat higher than before, they affected both his sales and his purchases. If he had a fixed income or was a wage earner, and if his receipts did not keep pace with his expenses, he thought that the difference was caused by the war. So the definition of the dollar underwent a gradual change in the common mind. Instead of being a fixed quantity of metal it might be the government's promise to pay the same at an indefinite future time. Five years after the end of the war this new definition received the sanction of the supreme court both as a legal and as an economical proposition. When the court declared that 25.8 grains of coined gold was in no sense a standard of a dollar, it gave a footing and a license in Congress and on the hustings to every possible vagary in finance. Congress, in 1874, availed itself of the court's permission to pass a bill increasing the

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amount of greenbacks then existing. But fortunately it was stopped by a presidential veto, which caused the party in power to turn suddenly about and pass a specie resumption act. This veto was the pivot upon which our financial policy turned; for, although without it we should have found our true path eventually, it would have been after a longer period and a more painful experience.

The resumption act was passed to meet a political rather than a financial exigency. The party in power was rent in twain by the veto of the inflation bill, and the only way for the fragments to come together again was for Congress to accept the president's platform. It was a case of Mahomet and the mountain. If the president would not agree to inflation, then Congress must agree to resumption. That it did so with reluctance was proved by subsequent events. General Bristow, then secretary of the treasury, informed me that it was with much difficulty that Senator Sherman was brought to the support of a resumption policy. Mr. Sherman was a man of clear and sane ideas on finance, but of extreme timidity in facing hostile votes in his own state. His hesitation in adopting the policy of resumption in 1875 was indicative, not of any misconception in his own mind, but of much misconception in the public mind, which manifested itself in the House two years later by the passage of a bill to repeal the resumption act altogether. This bill failed in the Senate by only one vote. Failing to repeal the resumption act outright, Congress passed by large majorities a bill to forbid the retirement of the greenbacks, whose redemption the resumption act had provided for. It was commonly believed that the retirement of the redeemed greenbacks would cause contraction of the currency. The fact was overlooked that the gold with which the greenbacks were redeemed would take their place in the circulation, in the form of coin or certificates, so that there would be no contraction.

Doubts existed as to the ability of the treasury to resume on the appointed day, notwithstanding a slow but persistent decline of the gold premium. These doubts were felt even by men in the higher ranks of finance, and some Wall Street capitalists lost large sums of money by speculating on a speedy exhaustion of the government's redemption fund. The saying of an influential banker, who was not a speculator, that he would give a large sum

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to have the foremost place in the procession at the door of the sub-treasury on resumption day, was widely repeated and generally approved. These doubters had failed to give due weight to events which were lowering the gold premium independently of the action of the treasury and which would soon have extinguished it altogether, even if no resumption act had been passed. Given a fixed sum of depreciated currency in a growing country, the demand for the circulating medium increases *pari passu* with population and wealth, and augments the value of the currency by the law of supply and demand. Secretary Boutwell was right when he said, in 1871, that the country would grow up to the volume of the greenbacks, and that the gold premium would disappear in obedience to natural causes. Although he was right, neither he nor anybody else imagined that the growth of business would overtake the volume of the greenbacks within eight years. That it did so may be reasonably inferred from the fact that the gold premium disappeared before the date fixed for resumption and that when the redemption bureau was actually opened scarcely any gold was called for. But the danger which menaced the cause of sound money during the interval (1871–1879) was not economical. The real danger was that public opinion would demand, and Congress would vote, an addition to the volume of greenbacks. And if Congress should vote for one such increment there would be no assignable limit to future additions.

Specie resumption was followed by a period of great prosperity, which would soon have extinguished all differences of opinion touching the definition of the dollar and would have brought about the desired equilibrium in 1879, but for an unexpected circumstance. Between the passage of the resumption act and its execution the gold price of silver fell ten per cent in the market.

This was an unheard of phenomenon in the modern world. Various causes were assigned for it by experts and ignoramuses, by economists and politicians. Some said that it was due to the great output of silver from the Comstock mines; others, that it was a consequence of the lessened demand for silver in India. Still others thought that it was caused by the demonetization of silver by Germany. Some even contended that our demonetization act of 1873 was at the bottom of the trouble. Official in-

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vestigations were made in various countries, including our own, which yielded scanty results.

We can see now that all of the foregoing reasons were either half-truths or wholly erroneous. Forty per cent of the product of the Comstock mines was gold. The surplus of silver was, therefore, only twenty per cent of the total output. The difference was too small to account for the disturbance.

The demonetization of silver by Germany was not a *vera causa*. It was itself the result of something else. A nation does not take the trouble to change its standard of value without good reason. It does not incur the expense of recoinage and suffer heavy loss by the sale of the discarded metal from mere caprice. The lessened demand for silver in India was likewise an inadequate explanation. If it were due to a gradual substitution of gold for silver, both for money and for ornaments, it was akin to what was going on in Germany, *i.e.* it signified a change in the public demand and the public taste. If due to a bad harvest and consequent poverty, these were events of frequent occurrence in India. Why had they not affected the relative values of the two metals before? As to our own demonetization act, we had no silver at that time to demonetize and throw on the market. Moreover the passage of the act was not generally known until after the great decline of silver had taken place. It was the latter event that first drew attention to the former.

Looking at the phenomenon from the superior standpoint of the present day, we can see that the great decline of silver that began about the year 1871 was due to uncontrollable commercial causes, which the governments of Europe and America could not have resisted even if they had tried. Gold had been the real standard of value in the civilized world long before. As the metal most acceptable and most convenient for the settlement of international balances, it had become the cynosure of the trading community. Every drawer and receiver of a bill of exchange had his mind fixed upon gold when drawing or receiving it, even though the bill itself were payable in silver. Hamilton observed this fact as existing in our own country in the latter part of the eighteenth century. England had been under the single gold standard twenty-four years before she became conscious of the

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fact and gave legal sanction to it. Germany was in the same situation long before 1871, although legally under the single silver standard. Under such conditions it was inevitable that whenever circumstances should impel the nations to overhaul their monetary systems they should adopt the single gold standard, thus making the law conform to the fact. Circumstances impelled Germany to reform hers in 1871, and she took the inevitable step. Her act was not the cause of the decline of silver in the early seventies, but was rather the sign and symptom of a commercial movement which was working with irresistible force in Germany and everywhere, and had been signalized some years earlier by the Paris Monetary Conference of 1867.

But whatever may have been the causes of the phenomenon, it took place in our own country at a most unfortunate time, in the midst of a monetary and political crisis, when it could produce the greatest confusion by freshly unsettling the public mind and breaking the peace that had been nearly won by the passage of the specie resumption act.

Europe did not wholly escape this disturbance; but in Europe the task of dealing with it was assigned to a small group of experts in each country, the mass of the population taking no interest in it even if they were aware that anything unusual had happened. The same course of proceeding would have been followed here if circumstances had been the same. All of our previous coinage legislation, from that of 1792 establishing the mint to that of 1873 demonetizing silver, had been the work in each instance of a few experts, the mass of the people giving no thought to the matter. The same popular apathy would have existed in 1876–78 regarding the decline of silver had not public feeling been already inflamed over the greenback question. But for this special and temporary excitement we should have contemplated the decline of silver in the same way that other civilized countries did. We should have congratulated ourselves that we had no stock of that metal on hand upon which a loss must be incurred. We should have been thankful that the demonetizing act of 1873 had been passed in time to prevent us from sharing the embarrassments of France, Germany and India. Our monetary equilibrium would have been reached when specie payments were resumed in

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1879, and we should now have four or five hundred millions more gold and less silver in circulation than we actually possess, since all of our silver certificates might have been gold certificates if Congress had so willed.

Two matters of importance, both incidental to the Civil war and contributing to our monetary equilibrium, remain to be mentioned. First, the national banking system. The public records show that Secretary Chase adopted this plan as a means of selling bonds and procuring money for the war, but that it had no perceptible effect in that way. To recast the banking system of a nation requires time, even when one knows how to go about it and has all power in his hands. Mr. Chase's *modus operandi* was defective, and he did not have unlimited power. The plan contemplated that all banks should secure their circulating notes by government bonds deposited in the treasury, but the federal tax which eventually compelled them to do so was not enacted until the beginning of 1865 and was not put in force until after the war was ended. Consequently no bonds were bought for this purpose during the progress of the war, except a mere bagatelle taken by the voluntary action of a few banks. Nevertheless the new banking system was and remains a gigantic success for banking purposes and a great bulwark of our monetary stability. So far as it supplies us a currency, it supplies one that is at par everywhere. It organizes credit and vitalizes the productive capital of the country admirably. It does not, however, supply a circulating medium to the extent that its resources and reputation would justify. Of $2,500,000,000 now circulating, national bank notes are only $432,000,000 — about one-sixth of the whole, and little more than one-half of what the law authorizes the banks to issue. The bank note circulation does not keep pace with the country's growth in population and trade, and since all other fiduciary circulation is limited by law and has reached its limit, further expansion will be mainly by means of gold certificates.

This brings us to another incident of the war period, which has proved to be a great convenience and an aid to monetary equilibrium. The law authorizing the treasury to receive deposits of gold and to issue certificates therefor of $20 and upward was passed in 1863. In the panic of 1893 the greenback redemption

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fund was reduced below $100,000,000. The law required that the issuing of gold certificates should be suspended whenever that condition existed. For some unexplained reason the treasury officials thereupon treated the law as though it were repealed, and refused to resume operations under it when the gold reserve was replenished. Congress accordingly re-enacted it in the year 1900, at which time the amount of old certificates outstanding (held mostly by banks for clearing house purposes) was $228,000,000. The volume of certificates has since increased by leaps and bounds. It is now above $500,000,000 and is still growing, and most of the increment has gone into general circulation, in obedience to a demand for a paper medium of exchange that could not otherwise be satisfied.

While nothing of this kind was contemplated by Congress in the original enactment of the law, it must be regarded as most fortunate in two particulars. It has contributed to cure the prime defect in the national banking system — the rigidity of its note issue — and has saturated the currency with gold. Each new certificate is a prop to our monetary equilibrium, since it increases the proportion of gold to the credit circulation. That proportion at the present time, counting only the gold in sight, is as 66 to 100, being about the same as that of the Bank of England. Our proportion would be even greater than it is if gold certificates could be issued of lower denominations than twenty dollars. There is no valid reason why ten-dollar certificates should not be issued. They are greatly needed now, the treasury being unable under present laws to meet the public demand for the smaller denominations in any kind of paper circulation. Of course, gold eagles, halves and quarters can be had without limit as to quantity, but our people do not like to carry metal in their pockets, except for small change; moreover the frequent handling of gold involves waste and loss by abrasion. The very next reform in our money system should be the lowering of the denominations of gold certificates to ten dollars, both as a public convenience and as a further support to our monetary equilibrium.

What we mean by monetary equilibrium is a state of absolute confidence that every dollar in circulation, whether of paper or of metal, is the equivalent in the hands of the holder of 25.8 grains of

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standard gold. Have we reached that state of confidence? If not, how far do we still come short of it?

Probably ninety-five per cent of our people are perfectly satisfied on that point now. Yet the remaining five per cent think that there is still some room for doubt. They know that the continued redemption of the greenbacks depends upon the will of Congress, and they remember that only ten years ago Congress refused to do anything whatever to replenish the redemption fund when the treasury was only two days removed from bankruptcy. What protects us against a similar crisis hereafter?

I have already alluded to the action or non-action of the St. Louis Convention, which assures us that no political party now calls in question the standard of value. This is perhaps the strongest guarantee we could have against a recurrence of the crisis of 1893, but our position has been improved in other ways. The act of March 14, 1900, increased the gold reserve for the redemption of legal tender notes by fifty per cent and provided for its replenishment in case of need, and it made the notes expressly redeemable in gold, whereas they had previously been redeemable in "coin." It separated the fiscal from the currency transactions of the government and prohibited the use of the gold reserve for any other purpose than the redemption of notes. But it authorized the secretary of the treasury to pay the notes out again "to purchase or redeem any bonds of the United States, or for any other lawful purpose the public interests may require, except that they shall not be used to meet deficiencies of the public revenues."

Now a deficiency of the public revenues cannot be judicially ascertained without a standard of a full or non-deficient revenue. The law does not supply such a standard. Apparently a deficiency means a shortage of ordinary income as compared with ordinary expenses during one fiscal year, regardless of any pre-existing surplus or deficit in the treasury. But there are extraordinary expenses and extraordinary receipts in time of peace and still more in time of war. Where is the line to be drawn which shall separate the ordinary from the extraordinary? A little reflection will show that this saving clause in the act of 1900 is meaningless or, at most, only advisory. The secretary of the treasury must determine for himself whether a deficiency of the

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public revenues does or does not exist at any time. In other words the paying out of redeemed greenbacks is optional with him, as it was before. This is a defect in the law which ought to be cured by an explicit proviso that legal tender notes presented for redemption shall not again be put in circulation except in exchange for gold deposited in the treasury by private persons. Thus the reissued greenbacks would be gold certificates in fact, although not in form; and in time public opinion would require that the form be changed so as to correspond with the fact.

Are our silver dollars to be considered a source of anxiety? Theoretically they are. They are a part of the fiat money of the country. They are like the greenbacks in all essentials. They circulate by virtue of the government's stamp, and the government accepts them in all payments to itself. There are $576,000,000 of them, $70,000,000 being in circulation as coin and the remainder as certificates. The field of retail trade has been practically reserved for them by law, and the growth of the country has been so rapid that the redundancy of 1894 has become a deficiency in 1904. There is not enough currency of denominations under ten dollars now to meet the legitimate demands of trade, and while this condition lasts the silver dollars must be at par, just as the subsidiary coins are. True, the latter are redeemed at the front door of the treasury, but the dollars are redeemed at the back door, in the custom house and in the tax office. That a real danger once existed from silver coinage was proved by experience, but it seems to have passed away. It should not be forgotten, however, that the government paid $464,000,000 gold for the bullion from which these needless dollars were manufactured. This was an unnecessary expense. It is possible eventually to recover this $464,000,000 without throwing any silver on the market. A bill is now pending in Congress with the approval of the secretary of the treasury to convert silver dollars into subsidiary coins as fast as the latter are needed. The annual increment of subsidiary silver required by the growth of population and of retail trade is about $5,000,000. If the policy is adopted of recoining the dollars into smaller pieces instead of buying new bullion therefor, the government will finally get back the money that was expended under the Bland and Sherman acts. Gold

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will flow in to fill the vacuum, and Congress can regulate the denominations of gold certificates to meet the public convenience.

May we not have too much gold in our circulation for the economical working of trade and industry? Of course our solvency can never be impaired by having an excess of it, but gold is capital. It is the product of labor, and the country may be compelled to use more of it than is really needed for effecting its exchanges and guaranteeing the soundness of its credit instruments. Credit dispenses with the use of capital to an incalculable extent. It is a labor saving machine of immense value, and it is not to be supposed that we have yet seen the last of its devices or that we have exhausted its utility. It does not fall within the scope of my theme to consider plans for bettering our bank note system so that it shall keep pace with the growing demands of trade, but such plans cannot be postponed forever in the face of a decreasing public debt and an increasing price of government bonds. If in the meantime we take more gold than is really needful into our circulation, that certainly involves some waste of energy, but of all financial evils it is the one most easily cured.

Although the greenback and the silver dollar are not a present cause for anxiety, all fiat money is objectionable, because it is a noxious microbe capable of multiplication. It would be best to remove it, so that its evil example may not be before the public eye to lure us astray in some future emergency.

It is needless to say anything to this assemblage about the advantages of monetary peace as contrasted with the turmoil through which the nation has struggled during the past forty years. All the reasons which exist for having any kind of money are reasons for having a good kind. It is the agreement of mankind which makes it good; and when we disagree about the definition of the dollar, we are plunged in doubts and fears, confidence and credit are impaired, enterprise is chilled, business partakes of the nature of gambling, widows and orphans are defrauded, labor is deprived of its just reward, and civilization sinks to a lower stage. All these conditions have been within the nation's recent experience.

To sum up: we may say that once upon a time the nation lost its financial pathway by accident and after wandering forty years in the wilderness regained it by a process of self-education. Dur-

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ing all its wanderings, however, it never repudiated nor failed to keep any contract that it had made. It has met both principal and interest of its bonded debt in the times and manner agreed upon, and has never imposed any tax thereon or allowed any inferior authority to do so. For all this it reaps its reward in the highest credit that any country ever enjoyed. There are some minor problems of finance yet to be solved, but since they may now be approached without passion we may fairly expect that they will be solved rightly and in good time. Let us hope that we have learned the cardinal principle of finance, *viz.*, that the monetary standard is established in the first instance by the tacit agreement of mankind, which it is the duty of the statute law to recognize, ratify and enforce, not to resist, counteract or annul.

May we confidently predict that the lessons of the past will not be forgotten and that the monetary equilibrium will never again be disturbed? Alas, history teaches that such lessons gradually fade from the public mind. Our colonial experience with bills of credit did not prevent the revolutionary fathers from following the same disastrous policy, nor did their example prevent us from repeating the experiment. Moreover, President Grant's veto of the inflation bill did not prevent Congress from passing another one sixteen years later, which was not vetoed and which was attended by disastrous consequences. But history teaches also that such disturbances of the monetary equilibrium usually have their beginning in a state of war. The colonies issued bills of credit in the first instance for war purposes and afterwards for other purposes. The revolutionary fathers did the same, and we also did the same. The teaching of history, therefore, is that if we would avoid the grossest financial errors of the past we should avoid as much as possible the direful curse of war. Perhaps no teaching could be more salutary to mankind.

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THE LAW CONCERNING MONOPOLISTIC COMBINATIONS IN CONTINENTAL EUROPE

THE problem of monopolistic combinations in industry is of world-wide character, but the law respecting them differs greatly in the most important states. These differences arise partly from various historical circumstances of social and legal development, but they are also due to different views as to the significance of such combinations and the attitude that the state should assume towards them with respect to both public and private interests.

Industrial combinations are by no means purely modern phenomena, and the jurisprudence of Europe in ancient as well as in modern times has addressed itself to the question of their propriety and legality. In the early empire, for example, the law made the cornering and engrossing of grain a criminal offense, and threatened the same with penalties varying from a denial of trading privileges to banishment and public labor. A law of Zeno, under the later empire, forbade under penalty of a heavy fine all combinations whereby it was agreed that a commodity should not be sold below a certain price. A similar policy was followed in the middle ages by the emperors of the Holy Roman Empire, and by the kings of France, and to their influence can be traced some of the provisions of modern European codes.[1]

The course of development in modern states has not only differed widely, but in the same state, at different periods, the changing views of political and social philosophy have been reflected in the law. A remarkable illustration of the effect of new ideas is seen in the legislation of the French Revolution, and notably in the law which forbade all associations in the form known to the French law as "corporations" (*i.e.* guilds or associations of persons in the same trade) on account of the odious monopolies which they had established under the *ancien régime*.[2] Another illustration

[1] Menzel, Die Kartelle und die Rechtsordnung, Leipzig, 1902, pp. 12–16. See also De Birague d'Apremont, L'Accaparementet les formes modernes d'ententes entre producteurs devant le droit pénal, Paris, 1903, pp. 37–54.

[2] *Cf. infra*, p. 27; De Birague, *op. cit.* pp. 54 *et seq.*

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of more historical importance, and resting on deeper rooted ideas of social policy, is found in the nineteenth century movement towards industrial freedom which has brought about the abolition of laws prohibiting employers and wage-earners from combining with respect to labor contracts. In this matter, indeed, the policies of modern states, following a strong democratic tendency, have shown more consistency than with respect to combinations to control production and prices. It is with this last question that we are here concerned.

The evolution and present condition of combinations in Europe is quite beyond the scope of this discussion; it is sufficient to say that, taking the continent as a whole, industrial combinations seem quite as numerous as in America and in some countries they are highly developed. They are usually called cartells. The European cartell corresponds to an American pool, but it is generally more highly organized. Consolidated organizations of business — trusts, fusions, mergers, *etc.* — are rarely found.[1]

The conditions of space and material make it necessary to confine the discussion of the law to the chief industrial countries of continental Europe, *viz.*, Germany, Austria, and France, although brief references will be made to certain others. For these three states it is possible to make a fairly complete statement of the law, although no attempt will be made to enter into the minute distinctions of legal interpretation nor to give an exhaustive digest of the cases. One phase of the subject, the regulation of competition in bidding on public contracts, will be omitted entirely.

The law can be most conveniently examined and clearly understood by taking each country separately, considering, first, the criminal law, and, second, the civil law, and examining under each (*a*) legislation, (*b*) judicial decisions and (*c*) comment of jurists.

I. *The German Empire*

The law of the German Empire is of special interest for two reasons: first, because the new code represents the latest effort of scientific jurisprudence and, second, because it was established at a time when industrial combinations had reached a high stage of

[1] *Cf.* Tschierschy, Kartelle und Trust, Göttingen, 1903, pp. 11 *et seq.*

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development in that country and had attracted the attention of statesmen and jurists.

The German criminal code[1] contains no prohibition against cartells nor any law specially concerning them.[2] A good many offenses under the criminal law might, of course, be committed by cartells. A case of some interest occurred recently under the article of the criminal code which prohibits extortion.[3] A powder manufacturing combination refused to supply dealers who did not buy exclusively of them. One of their customers purchased supplies from an outsider and was threatened in consequence with a discontinuance of supply. The imperial court condemned this as contrary to the law.[4]

The provisions of the civil law in Germany are much more important with respect to cartells than those of the criminal law, but here also nothing is to be found preventing their establishment. The civil law implicitly recognizes the validity of cartell contracts, because it establishes the general principle of freedom of contract, without making any exception of cartell contracts.[5] Cartells have been attacked, nevertheless, in the courts, both under the industrial code and under the civil code.

The industrial code (*Gewerbeordnung*) establishes the general principle of free industry in its first section, which reads: "The pursuit of an industry is permitted to everyone, in so far as exceptions or limitations are not imposed or permitted in the present law." The interpretation of this section goes back to the beginning of the activity of the German imperial court. The earlier cases were regarding such restraints on the freedom of industry as are contained in contracts to abstain from engaging in a certain business under certain conditions of time and space. In a case decided in 1880 the court said: "The industrial code does not aim

[1] Strafgesetzbuch für das deutsche Reich.

[2] Menzel, *op. cit.* p. 7; Landesberger, in Gutachten über die rechtlichen Behandlungen der Industrie-Kartelle, Verhandlungen des 26ten Deutschen Juristentages, Berlin, 1903, p. 350; Hirsch, Die rechtliche Behandlung der Kartelle, Jena, 1903, p. 7.

[3] StGB, sec. 243.

[4] Urteil v. 29 Nov. 1900, Entscheidungen des Reichsgerichts in Strafsachen, vol. xxxiv, pp. 15 *et seq.*

[5] Landesberger, in 26ten Juristentag, p. 350; Hirsch, *op. cit.* p. 7; Menzel, *op. cit.* p. 16.

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to limit the freedom of contract to any greater extent than is required in the interest of the public."[1] In 1890 a case came before the imperial court concerning the relations of a publishers' and booksellers' cartell with an outsider, against whom certain discriminations had been made on account of rate-cutting. The cartell was attacked as an infringement of the principle of free industry. The court, however, denied this and said in part:

From the principle of industrial liberty it does not follow that there must be no interference with the free play of economic forces, in the sense that persons engaged in an industry should be prohibited from endeavoring in the way of associated self-help to regulate the activity of these forces and to prevent excesses that are deemed injurious.[2]

The most important decision of all was in the case of the Saxon wood pulp cartell in 1897. In this the court declared that a cartell was not only not contrary to the principle of free industry but was often in the interest of the public as well as of the members of the cartell. As regarded the claim that the cartell was contrary to the principle of industrial liberty, the court said:

This objection cannot, however, be regarded as well founded. The association which appears in this case as plaintiff was established, as is expressly stated in its statutes and is not disputed in the pleadings, in order to prevent in the future a destructive competition between the Saxon wood pulp manufacturers, and to make possible the attainment of higher prices than could be gotten with unrestricted competition.

After noting that associations for such a purpose are often regarded, "especially outside of Germany," as violating the principle of industrial liberty and the public interest which that principle aims to further, the court continued:

If in any branch of industry the prices of the products sink too low, and the thriving operation of the industry is thereby made impossible or endangered, then the crisis which occurs is destructive not only to the individuals but also to the social economy in general, and it lies therefore in the interest of the whole community that immoderately low prices shall not exist permanently in any industry.

[1] Urt. v. 20 Oct. 1880, Entsch. des RGer. in Civilsachen, vol. ii, p. 120.
[2] Urt. v. 25 Juni, 1890, Entsch. des RGer. in Civilsachen, vol. xxviii, p. 244.

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Hence the court concluded that cartells are not improper in principle, but it indicated that this conclusion does not justify them absolutely in all cases.

To contracts of the kind under consideration, therefore, exception can be taken from the standpoint of the protection of the general interests through industrial freedom only if in individual cases objections arise from particular circumstances, especially if there is an evident purpose of establishing an actual monopoly and of effecting an usurious exploitation of the consumers, or if these consequences are actually brought about by the agreements and arrangements made.[1]

This last statement is of especial interest, because it shows that the court recognizes at least a theoretical limit to the freedom of combination. This limitation, however, does not seem to have any great practical value, inasmuch as there are various cartells which have organized a practical monopoly and have pursued what may be fairly termed extortionate price policies, in the face of bitter complaint and against litigious parties, without the legality of their constitution being called in question.[2]

It appears, therefore, from the uniform judgments of the imperial court that the cartells are not regarded as infringing the principle of industrial liberty.

Under the civil code the cartell contracts have likewise been declared lawful. There are only two articles of interest here, which read as follows:

Art. 138. A jural act that is repugnant to morality is void.
Art. 826. Whoever, in a manner repugnant to morality, intentionally inflicts an injury upon another is bound to such other for compensation of the injury.[3]

It does not appear that any efforts have been made to attack the validity of cartell contracts under the first of the above sections

[1] Urt. v. Feb. 4, 1897, Entsch. des RGer. in Civilsachen, vol. xxxviii, pp. 156–8.

[2] *E.g.* Halbzeugverband, Cokssyndicat.

[3] Bürgerliches Gesetzbuch für das deutsche Reich, arts. 138, 826. For *Rechtsgeschäft*," here rendered "jural act," there is no precise English equivalent: it includes all acts by which individuals endeavor to produce legal results — contracts, conveyances, *etc.* The phrase translated "morality" is "*die guten Sitten*," which is itself a translation of the Latin "*boni mores*."

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(138), but decision was rendered on the same point of law in a number of cases before the present code went into effect. An early cartell case was decided in the highest Bavarian court (*oberstes Landgericht*) in Munich, April 7, 1888. In this case the court declared that a cartell contract of certain tile manufacturers to limit production and fix minimum prices was not only valid, but also a prudent business arrangement. The court denied that either the aim or the means adopted in such an agreement was *contra bonos mores*.[1]

Of much greater importance, because decided in the imperial court, was the case of the book publishers' cartell referred to above. It was claimed that this cartell was contrary to good morals and public order. The court said that such a point of view might be relevant, if it were shown that a combination had been formed to control the market and to check the free play of economic forces for speculative purposes, but went on to say:

A complete distinction should be drawn between such combinations and associations of fellow craftsmen for the purpose, pursued in good faith, of maintaining an industry on a living basis through protection against depreciation of products and against other disadvantages arising from the price cutting of individuals.[2]

The other article of the civil code (826) cited above might have some application to the malpractices of cartells, but not to their legal existence. A case came up recently wherein a steamship line tried to force a competing line out of a certain trade by refusing to take freight at the ordinary rates from one of its large shippers if he continued to patronize the competing line. The injured shipper brought suit to compel the steamship line to desist from such action. The claim of the plaintiff was sustained in the court of first instance, denied on appeal, but again sustained in the imperial court. The imperial court said, in part:

Article 826 is adapted and also intended by the legislator to establish a protection against unfair treatment in a comprehensive manner,

[1] Steinmann-Bucher, *Schmoller's Jahrb.*, 1891, pp. 186, 187; Menzel, *op. cit.*, pp. 43, 44.

[2] Urt. v. 25 Juni, 1890, Entsch. des RGer. in Civilsachen, vol. xxviii, pp. 243, 244.

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particularly for business intercourse, in so far as provision is not made through special laws.[1]

The court suggested that an action for extortion might lie. It also pointed out that the obligation of a common carrier (*Transportzwang*) was established in Germany for railway transportation only, not for other land carriage, nor for sea carriage; and suggested that such a compulsion might appear to be necessary, especially against enterprises which subserved a public interest and which possessed, legally or *de facto*, a monopoly of such service. Meanwhile, even in the absence of any legal duty to render the service, the arbitrary and unfair refusal of transportation at the ordinary rates was to be regarded as an action *contra bonos mores*. As a standard of morals within the meaning of article 826, the court accepted the sense of propriety (*Anstandsgefühl*), of right-minded persons, and in commercial matters the views and sentiments of honorable business men.[2]

Although this case had no direct relation to the cartells, the position taken by the court is of much interest as showing its attitude towards monopolies and towards practices in which cartells are frequent offenders.

In this connection may be noticed again the case of the book publishers' cartell. The court denied the claim of the plaintiffs to damages from the cartell upon the ground that the record showed no injury, but it did not decide whether the means used by the cartell against outsiders, *viz.*, total exclusion from supply of books, refusal to furnish the trade journal or to publish advertisements therein, denial of certain rebates and the publication of a black list in the trade journal, were lawful or not, although it intimated that they were not lawful.[3]

The courts have not only refused to declare cartell contracts illegal, but they have also expressly declared them valid, including the penalty clauses embraced therein for violation of such agreements. Thus, in the above cited Saxon wood pulp cartell, the

[1] Urt. v. April 11, 1901, Entsch. des RGer. in Civilsachen, vol. xlviii, p. 119.

[2] Urt. v. April 11, 1901, Entsch. des RGer. in Civilsachen, vol. xlviii, pp. 123–127.

[3] Urt. v. 25 Juni, 1890, Entsch. des RGer. in Civilsachen, vol. xxviii, pp. 239–241, 245–251; *cf.* Menzel, *op. cit.*, pp. 44, 45.

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refusal to pay the conventional fines was declared a breach of a lawful engagement.[1] This decision was made before the code in its present form went into effect, but the same principles were applied as in the recent case regarding the interpretation of the agreement of the coal syndicate. Speaking of this agreement the court said: "against the validity of which well-founded objections do not exist." The court declared that the Hannibal mine must perform its obligations under the agreement, or pay damages.[2] A still more recent case, in which the validity of a cartell agreement was involved, concerned the right of a member to withdraw. The court held the agreement to be a valid one, but declared that a member might withdraw in case the other parties made the proper fulfilment of the contract impossible.[3]

In the opinions of jurists may be found some useful criticism of the meaning and possibilities of the present law. The subject was considered with much minuteness in the twenty-sixth convention of the German jurists in 1902, and was again under consideration at their recent meeting in the autumn of 1904. One of the prominent speakers in the convention in 1902 declared that the existing law was sufficient to prevent objectionable practices, *i.e.*, associations aiming at monopoly could be attacked at their establishment under article 138, and in their operation under article 826.[4] Landesberger expressed the opinion that it was possible to test the validity of cartell contracts generally under article 138, and supported his opinion by a citation from the opinion of the imperial court in the Saxon wood pulp manufacturers' case. He said:

> I do not hold it [article 138] as totally inapplicable. Cartell agreements and cartell resolutions of a directly usurious character or acts done in the execution of cartell resolutions which were demonstrably intended to ruin an outsider, might well be characterized as *contra bonos mores*.[5]

[1] Urt. v. 4 Feb., 1897, Entsch des RGer. in Civilsachen, vol. xxxviii, pp. 155, 156.

[2] Zeche ver. Hannibal W. Rheinisch-Westfälisches Kohlensyndikat, Urt. v. 19 Feb., 1901, Entsch. des RGer. in Civilsachen, vol. xlviii, pp. 308–315.

[3] Urt. v. 6 Nov., 1902, Entsch. des RGer. in Civilsachen, vol. liii, p. 19.

[4] Nentwig, im 26ten Juristentag, p. 292.

[5] Landesberger, im 26ten Juristentag, p. 350.

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He confessed that in any case the article was applicable only in a very limited range of cases. (Rundstein takes a somewhat similar position, holding that article 138 would apply, if cartells possessing a monopoly were guilty of exploiting the public, or if it could be proved that they intended to do so.[1]) Boyens thought that a cartell contract that did not provide a fair arrangement between the members — one, for example, that gave the large members too much power over the small members — might be *contra bonos mores* in the sense of article 138.[2] It is interesting to observe that the original draft of article 138 had a wider scope, invalidating not only jural acts that were repugnant to morality, but also such as were repugnant to public order.[3]

A good deal of hope, in a small way, appears to be put in the provisions of article 826. For example, Juliusberg thinks that boycotting and usurious exploitation through exorbitant prices may be made a ground of action for damages under this article.[4] Boyens claims that intentional underbidding, with the aim of preventing a competitor from working without loss, or of compelling him to enter a cartell, may be attacked under this article as an effort to cause damage to another in an immoral fashion, and that such proceedings may be contested both preventively and repressively. For these reasons, also, a cartell might be declared invalid.[5] Menzel, on the other hand, thinks that article 826 is of little practical significance in opposing cartell excesses, because a judgment can seldom be obtained on account of the difficulty of proving malice (*dolus*).[6]

II. *Austria*

In no important industrial country in Europe are the laws less favorable to industrial combinations than in Austria, but in

[1] Rundstein, Das Recht der Kartelle, Berlin, 1904, p. 62.

[2] Boyens, im 26ten Juristentag, p. 329.

[3] *Cf.* Menzel, *op. cit.*, pp. 35, 36. The term used was "*öffentliche Ordnung*" which may be taken as precisely equivalent to the French "*l'ordre public*," and substantially equivalent to the English "public policy."

[4] Juliusberg, Die Kartelle und die deutsche Kartellgesetzgebung, Berlin, 1903, p. 32.

[5] Boyens, im 26ten Juristentag, pp. 338, 339.

[6] Menzel, *op. cit.*, p. 43.

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hardly any other country are such combinations more numerous. The laws concerning them were established at a period before they had acquired the significance that they possess to-day, and the application of these older laws to cartell agreements has been sometimes disputed. The policy of the Austrian government has tended recently to increase the restrictions placed on combinations, but the legislative projects in this direction have not been enacted into law.

There are no penal laws against industrial combinations. The penal code of 1852, which in general is still in force, provided that "agreements of persons engaged in industry [*Gewerbsleute*], manufacturers [*etc.*] . . . to raise the price of a commodity . . . to the disadvantage of the public or to reduce the same to their own advantage or to cause a scarcity," should be punished as misdemeanors.[1] The provisions of this section were abrogated by the law of April 7, 1870, which declared that such agreements should be deemed repugnant to the penal law only in case intimidation or force were used. The Austrian criminal law, therefore, now contains no provisions specially applicable to cartells.[2]

It should be noted, however, that while the law of April 7, 1870, abolished the penalties previously imposed on industrial combinations, it did not legalize them from the point of view of the civil law. On the contrary, article 2 of the law of 1870 declares that certain agreements concerning the giving or taking of employment, *etc.*, "have no legal operation." Article 4 declares: "The provisions contained in articles 1 and 2 have application also to agreements of persons engaged in industry [*Gewerbsleute*] with the purpose of raising the price of a commodity to the disadvantage of the public."[3]

The law of 1870, therefore, made industrial combinations void, but, on account of the character of the law of procedure existing before 1895, this declaration of the statute could be evaded, for most practical purposes, by providing that any matters of dispute in regard to the obligations of the parties to the agreement should

[1] Strafgesetzbuch vom 27 Mai, 1852, art. 479.

[2] *Cf.* Menzel, *op. cit.*, p. 19.

[3] Gesetz vom 7 April, 1870, Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder, Jahrg. 1870.

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be submitted to a private board of arbitration, established by the said agreement. According to the law of procedure existing before 1895, the decisions of such an arbitration were binding and could be annulled in the courts only in case of open fraud.[1] The law of procedure was altered in 1895 by the introduction of a new code, which declares that the decisions of a private court of arbitration are inoperative "if repugnant to compulsory rules of law," and it is provided that parties cannot lawfully renounce their right of appeal to the courts in such cases.[2]

There have been some important judicial decisions in Austria respecting the validity of cartell agreements, interpreting the law of 1870. It is remarkable that no cases came up for decision until within the last decade, and after Professor Menzel had pointed out its application in his celebrated discussion of the subject before the *Verein für Sozial-Politik* in 1894.

The first cartell case to be decided was with respect to a cartell of oleum producers, which had been organized in 1887 for a limited period for the regulation of the sale of oleum, chiefly, though not exclusively, in the export trade. A suit was brought for damages for breach of the terms of the agreement, and the defense was made that the contract was invalid under the law of 1870. The supreme court (*oberster Gerichtshof*) held that the agreement was invalid, and denied the claim for compensation. The court said: "The plaintiff objects, with justice, that such an agreement is without legal operation." The decision of the court depended largely on verbal definitions. The word "*Gewerbsleute*" was held to include every industrial producer, and the word "*Gewerbe*" was held to be applicable to factory production as well as to handicraft. Popular use, it seems, had come to restrict "*Gewerbe*" to the form of industry practiced by petty craftsmen and artisans, but the court pointed out that the term was used in various laws to embrace factory industry and that there was no reason to suppose that the legislator intended to protect the public against the

[1] Allgemeine Gerichtsordnung, art. 273.

[2] Civilprocessordnung, vom 1 Aug. 1895, art. 595.

There is also a provision in the Austrian civil code (Allgemeines bürgerliches Gesetzbuch, art. 878), very similar to art. 138 of the German civil code, mentioned above.

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extortion of handicraftsmen only. The court also held that proof of the advance of prices was not necessary, and that a limitation of the agreement in respect to the area or term of operation did not make it lawful.[1]

Another cartell case came before the supreme court of Austria in the following year (1899) concerning a combination among the talc producers (*Federweisscartell*) of Styria, which had established a central selling bureau in Vienna for a term of five years. Conventional penalties were provided for breach of the agreement. A firm which was a member of the cartell brought an action to obtain a judgment that its contract under the cartell agreement was invalid, but this claim was rejected in the local and provincial courts.[2] The supreme court took the same view as in the case noticed above, and declared the compact void. In regard to prices the court said that it was not necessary to prove that there had been an advance of the same to the disadvantage of the public, but that the intent to raise prices could be deduced from the nature of the agreement. Such an indication of intent appeared in provisions for the limitation of output or for the regulation of prices by a central bureau, *etc.* The court defined the meaning of the statute further by declaring that the rule applied not only to finished products and articles of daily use, but also to unfinished goods and goods used in production.[3]

We may notice, finally, a third case, which was decided on appeal in a provincial court. The cartell concerned was that of the Austrian enameled utensil producers. The court of original instance declared the cartell contract null and void, but held that the contracts between the cartell members and their agent — the provincial bank — were valid. The upper provincial court denied the validity of all these contracts. The court said in part:

There is no doubt that the agreement of the plate and enameled utensil cartell has simply the purpose to raise the price of an article of consumption at present necessary and of general use, or to prevent the decline

[1] Entsch. v. 20 Jan., 1898, Sammlung v. civilrechtlichen Entsch. des k. k. obersten Gerichtshofes, vol. xxxv, no. 242.

[2] Grunzel, Ueber Kartelle, Leipzig, 1902, p. 147.

[3] Entsch. v. 6 April, 1899, Samml. civilrechtl. Entsch. des k. k. obersten Gerichtshofes, vol. xxxvi, no. 3419.

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of the same. . . . If the defendants claim, therefore, that they aim simply at the restoration of the market to normal conditions, then that is simply to be understood in the interest of the cartelled firms, but not in the interest of the public. . . . The objection that since the formation of the cartell the retail prices have fallen is irrelevant, according to the coalition law, as regards the legal operation of the cartell.[1]

It seems that the court regarded the contracts between the cartelled producers and the bank which acted as their agent as invalid, on the ground that the general organization fixed the prices and the bank was, in effect, an organ of the cartell and not a third party.[2]

The criticism of jurists is of considerable interest in connection with the Austrian law. Menzel wrote, in 1894, that "Austria is the only state which possesses an explicit and unambiguous legal norm concerning the validity of cartell agreements."[3] Nevertheless the lower courts have not shown perfect agreement with the supreme court as to the meaning of the law, and some intelligent writers have strongly objected to the position taken by the supreme court. Hitchmann, for example, criticises the declaration of the court in the talc producers' cartell case, on the following grounds: (1) there was no express price agreement, which he thinks should be necessary to bring it clearly within the prohibition of the law; (2) "*Gewerbsleute*" does not include manufacturers, but designates only petty craftsmen; and (3) the "public" does not mean a particular group of people, but the people generally, who are interested in the prices of consumption goods only.[4]

Grunzel (who is in a measure a representative of the industrial interests) also objects strongly to the interpretation of the law given by the supreme court. He holds with Hitchmann that neither law nor custom warrants applying the term "*Gewerbsleute*" to large corporations. Further, he denies that the existence of a cartell is sufficient evidence of intent to raise prices, and asserts that most cartells do not attempt to raise prices, but try

[1] Quoted from Grunzel, *op. cit.*, p. 148.
[2] *Cf.* Landesberger, im 26ten Juristentag, p. 354.
[3] Menzel, *op. cit.*, p. 19.
[4] Hitchmann, Kartelle vor Gericht, *Handelsmuseum*, 16 Nov. 1899, pp. 541, 542.

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to keep them from falling. He points out that the law expressly states that agreements designed to advance prices are unlawful, and he ridicules the attitude of the court in saying that the proof that retail prices have fallen is irrelevant. He holds also with Hitchmann that the commodities embraced within the meaning of the law are those of general use, and would not include, for example, locomotives or potash.[1]

Still more significant is the statement made in the explanation of motives which accompanied the celebrated Austrian cartell bill of 1897. The representatives of the government expressed doubts as to how far the law of 1870 would be applicable in respect to the validity of cartell agreements. According to the opinion expressed therein, it would not affect: (1) cartells for the maintenance (not increase) of prices; (2) cartells for the depression of the prices of the raw material, whether directly, or indirectly by a *rayon* agreement; and (3) cartells to procure more favorable arrangements as to freights, insurance, *etc.*[2]

In regard to the question whether prices have been advanced or not, attention should be called to the wording of the statute, which expressly regards aim or purpose (*Zweck*). Rundstein approves of the position taken by the courts that the actual price movement is immaterial.[3]

In spite of the unfavorable attitude of the law, cartells have flourished in Austria almost as vigorously as in Germany. They exist, as Landesberger says, according to the maxim: "Where there is no plaintiff, there is no judge." He says that the cartells might be attacked successfully only if an action by outsiders (*actio popularis*) were allowed, though even such an action would not do much more than procure a formal declaration of nullity. Such agreements exist, in other words, not by virtue of law but on the basis of business convenience and commercial faith and credit — "but only as long as self-preservation is not at stake." Their existence and practical operation depend on the interests of pri-

[1] Grunzel, *op. cit.*, pp. 144–149.

[2] Regierungsvorlage, Gesetz vom . . . über Cartelle in Beziehung auf Verbrauchsgegenstände, u. s. w., 154 der Beilagen zu den Stenogr. Protokollen des Abgeordnetenhauses, XV Session, 1898, erläuternde Bemerkungen, pp. 23, 24.

[3] Rundstein, *op. cit.*, p. 54.

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vate parties in maintaining or destroying them, so that under the existing law the good ones may be destroyed and the bad ones may survive. The effect of the law of 1870, therefore, according to this authority, is to deprive parties of the right of complaint for the non-observance of cartell agreements, and to make them void in all matters for which the courts have to consider them.[1]

III. *France*

The era of the Revolution was marked by the abolition of the ancient *corporations*, *maitrises* or *jurandes*, and by the enactment of severe laws against combination. The law of June 14–17, 1791, denounced agreements of members of the same trade to fix the price of their industry or labor as "unconstitutional, hostile to liberty, and of no effect."[2] On July 26, 1793, the "*loi contre les accapareurs*," *i.e.* the law against engrossers and the like, was adopted, which threatened offenders with the penalties of death and confiscation.[3] Just before this, on May 4, 1793, the famous law of the maximum had been established, *i.e.* a law which fixed the maximum price for each of a great variety of articles, in order to afford a prompt remedy against monopoly.[4] Most of the legislation of the Revolution in this direction was of an ephemeral character, but the law against *l'accaparement*, with less severe penalties, was embodied in the penal code of 1810, articles 419 and 420, and has continued to the present day. The more important of these articles reads as follows:

Art. 419. All those who by false or calumnious reports sown by design in the community, by offers of prices in advance of those asked by the vendors themselves, by union or coalition between the principal possessors of the same merchandise or commodity not to sell or to sell at a certain price only, or by whatever fraudulent ways and means,

[1] Landesberger, im 26ten Juristentag, pp. 350–355. It is noteworthy that the *Kaufmännischer Verein* of Vienna recently condemned any attempt by a member of a cartell to escape his contractual obligations by recourse to the courts. *Cf. Kartell-Rundschau*, 1904, p. 435.

[2] Loi relative aux assemblés d'ouvriers et artisans de même état et profession, 17 juin, 1791, Lois et actes du gouvernement, vol. iii, Paris, 1834.

[3] Babled, Les syndicats de producteurs et détenteurs de marchandises, Paris, 1893, p. 126. De Birague, *op. cit.*, pp. 61, 62.

[4] Babled, *op. cit.*, p. 128.

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shall have effected the advance or decline of the prices of commodities or merchandise or of public securities above or below the prices which the natural and free competition of trade would have fixed, shall be punished with imprisonment of one month at least or of one year at most and with a fine of five hundred francs to ten thousand francs. The culprits may, further, be placed by decree or judgment under the oversight of the superior police during two years at least and five years at most.

The following article (420) provides heavier penalties if the commodities in question are breadstuffs, bread, or wine or other potables.

Since the adoption of this code, other laws of minor importance have been enacted concerning combinations under particular conditions.[1] For our present purpose, these require no notice. One law, however, not directly concerned with our subject, requires attention, because it has been declared in some quarters to abrogate articles 419 and 420 of the penal code. This is the law of March 21, 1884, concerning the establishment of trade associations. In article 3 of this law, the aim of the associations authorized is defined as follows: "Professional syndicates have for their exclusive aim the study and defense of economic, industrial, commercial or agricultural interests."[2] The courts have held, as seems only reasonable, that this does not permit them to violate a criminal statute from the operation of which they are not expressly excepted.[3]

One of the earliest cases involving the status of cartells under the criminal code was that of certain soda manufacturers of Marseilles, which was decided in 1838. These manufacturers had formed a combination to sell all their output through the agency of one Mille, who added the precaution of hiring six factories, which were not in operation, in order to prevent the reëstablishment of competition. Prices were advanced about 25 per cent, although the price of the raw material had declined. The court

[1] *Cf.* Colliez, Trusts, cartels, corners, Paris, 1904, p. 467; Merlin, Les associations ouvriers et patronales, Paris, 1899, p. 129.

[2] Loi 21 mars, 1884, relative à la création des syndicats professionels.

[3] *Vide infra*, p. 32, A. et autres c. Germain-Perret, Cour de Lyon, 21 avril, 1896, Journal du Palais, 1896, part ii, p. 164.

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of cassation declared briefly that this combination came within the prohibition of article 419.[1] In a case decided in the same year, the court of cassation declared that a combination of concerns in the form of a fusion or consolidation was not an illegal coalition, within the meaning of that article, because a plurality of persons was necessary, and this was not found in a single juristic person (*personne morale*).[2] In the year following (1839) an action was brought against a coach company, respecting agreements as to the price of places, and the court of cassation declared that the commodities embraced in article 419 included incorporeal as well as corporeal goods.[3]

The following decision illustrates the application of the law where prices are depressed by combination. A case came before the court of cassation in 1879 concerning a combination among the manufacturers of iodine, who employed a common purchasing agent, divided up the field which supplied the raw material, and fixed the prices of the same. The court said that this was a combination, "organized by the principal manufacturers of iodine," tending to give to the commodity prices above or below the course which would have been determined "by the free and natural competition of commerce," and was repugnant, therefore, to article 419 of the penal code and to article 1133 of the civil code.[4]

The earlier judgments of the French courts showed a tendency to interpret and apply article 419 in a comprehensive and effective manner. The modern tendency has been less rigorous. The opinion of the court of Paris in the following case is a good illustration of this statement. It is quoted at considerable length, because it shows very clearly the mode of reasoning adopted by the courts at the present day. The judgment is prefaced by a statement of the facts:

That Ferry and May have made contracts like those in question with all the other principal producers of phosphates of the Somme; that the

[1] Mille et autres fabricants de soude de Marseille c. Ministère public, Cour de Cassation, 31 août, 1838, Journal du Palais, 1838, p. 391.

[2] Bulletin des arrêts de la Cour de Cassation Criminelle, 1838, p. 40.

[3] Cour de Cassation, août, 1839, Journal du Palais, 1839, p. 297.

[4] Cournerie c. Pellieux et Mazé-Launay, Cour de Cassation, 11 fév. 1879, Journal du Palais, 1879, p. 490.

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production of all the adherents thus grouped together is about two-thirds of the total production of the Somme; that the agreements present the appearance of a contract of commission, but it is not the less evident that they have for their end simply the monopoly [*l'accaparement*] of the product to the profit of the group directed by Ferry and May, and of the two latter themselves, that, in fact, each of the adherents must limit his production to a fixed figure; that he is forbidden furthermore to sell or deliver directly, under any form whatever, either in France or abroad, any crude phosphates, dry or milled, of a standard equal to or higher than dry 60 per cent tri-basic calcium phosphate; that a penalty was stipulated in case of infraction of this clause; and that the minimum and maximum selling price was fixed semi-annually in a general meeting, convoked by the order of a supervisory committee.

On the basis of these facts the court reached the preliminary conclusion:

That such agreements are illegal; that they constitute, in fact, a true coalition, tending to advance the course of phosphates above the price which would be fixed by free competition and to prevent sale below the price thus artificially increased; that they fall, therefore, under article 419 of the penal code and would be in consequence null, as contrary to public order.

Certain other facts and considerations, however, were recognized as modifying this conclusion:

Considering that it is necessary, in order that article 419 apply, that there be a union or coalition between the principal holders of the same merchandise or commodity, with the intent of not selling except at a price different from that which would have been fixed by free competition; that it is proper to inquire, if, in the present case, evidence is found of this double fact, both as concerns the union or coalition, and as concerns the end sought or obtained;

Considering, that it is proper, first of all, to observe that the merchandise in question [phosphates] is a product which, be it of the same grade, be it a grade of less richness as to the tri-basic calcium phosphate which it contains, is met with, not only in the Somme, but is further distributed in great quantity over the whole surface of the earth, and notably in various parts of France, Belgium and America; . . .

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Considering, on the other hand, that, if it be true that a certain number of the producers of the Somme are grouped around Ferry and May, their common agent, by their adhesion to contracts similar to that of December 26, 1887, it is proper to remember that this group, as results from the explanations furnished at the bar by Cajot & Cie. themselves, represent only two-thirds of the total production of the Somme; and that, if it is true, as is observed, that by reason of the geographical situation of the deposits the operations of the said group can have a great importance upon the French market, it is established, on the other hand, that this group is held in check, as well by the outside producers of the Somme, as by other French and foreign producers; . . .

In view of these facts, the court declared that there was not "the union or coalition between the principal holders of the commodity" mentioned in article 419 of the penal code. The court added the following significant statement:

That this syndicate comprises in reality but a part of the phosphate works of the arrondissement of Doullens; that they have agreed upon the determination of the amount of their output, in order to assure the movement to market and principally the exportation of the same, and for the defense of their common interests, and to fight without disadvantage the competition of numerous markets, as well in France as abroad; that one cannot demonstrate in respect to it either monopoly, or attempt at monopoly of the said commodity.[1]

A case of international notoriety, and of some interest on account of the points of law involved, arose in connection with the famous copper corner (1887–89) engineered by Secrétan in Paris. Appeal was taken to the court of cassation from the judgment of the court of Paris, but the same was affirmed on grounds substantially as follows. Secrétan had caused an advance in the price of copper by his contracts with producers in various parts of the world, who were cognizant of his objects and hoped to profit by his operations, but who had made no agreements with each other. The price of copper, furthermore, was not agreed upon, nor was there any attempt to fix it, though it was hoped and expected that it would be advanced. In considering this situation with respect

[1] Cajot et Cie. c. Ferry et May, Cour de Paris, 14 avril, 1891, Journal du Palais, 1892, part ii, p. 150.

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to article 419 of the penal code, the court of Paris declared that the agreement of Secrétan as a buyer with the producers as sellers was such as to bring it within the prohibition of the law, as the combinations forbidden by the law did not have to be exclusively among either buyers or sellers, and the agreements of the various producers with Secrétan were in effect, though indirectly, an agreement among the producers. One circumstance, however, essential to the proof of a violation of the law was lacking, namely, an agreement as to the price. From the nature of the arrangement this could only exist in the assumption by Secrétan of an obligation to sell only above a certain price, and no such condition was to be found in the contracts. Hence the court concluded that the law had not been violated.[1]

A rather interesting case came up in 1892 concerning a combination of pottery manufacturers near Grenôble who had established a central selling agency. In view of the facts that the agreement was limited as to time and as to markets, that it embraced only a minority of the producers of the commodity, and that the prices had fluctuated with the market, the court concluded that the agreement was not an unlawful one under article 419.[2]

The courts do not always take this benignant attitude, even at the present day, as may be seen from the next case, which also shows the interpretation put on the law of 1884, regarding *syndicats professionels*, with respect to article 419 of the penal code. Germain-Perret brought a complaint against certain dealers in aërated waters with whom he had been associated, namely, eighteen of the principal dealers of Lyons, who had formed a syndicate in 1891. This syndicate determined the selling price under the sanction of conventional penalties, among which was exclusion

[1] Secrétan c. Société des Métaux, Cassation, 24 avril, 1891, Journal du Palais, 1901, part ii, p. 227, note. This decision has not met with universal approval. De Birague writes (*op. cit.*, p. 98): "Pour que la condamnation soit possible, il n'est d'ailleurs pas nécessaire que l'on rapporte la preuve d'un engagement *exprès* pris par les coalisés, de ne vendre qu'à certaines conditions; il suffit qu'il ressorte suffisamment des débats que tel était le but auquel *tendait* la coalition. La décision contraire, rendue par la Cour de Paris dans l'affaire des Métaux, est généralement critiquée."

[2] Bonneton c. Société des Tuileries, Cour de Grenôble, 1 mai, 1894, Journal du Palais, 1894, part ii, p. 278.

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from the syndicate, with notice of the fact to the parties who operated the springs, from whom the supplies were obtained, and with whom the dealers had an understanding that they should be supplied exclusively. In consequence of the fact that he was no longer a member of the syndicate, Germain-Perret found himself unable to supply himself with mineral waters, except by indirect and more expensive methods. The court said:

Considering that the coalition in question has thus had the effect of advancing the price of waters to him above that which would have been fixed by the natural and free competition of trade . . .

Considering that the right accorded by the law of March 21, 1884, to form syndicates could not exonerate the accused from the responsibility incurred by them by reason of the above facts; that even if the syndicate established by them in 1891 had been within the terms of that law, the exercise of the rights conferred by it cannot render lawful the violation of the prohibitions decreed by articles 419 and 420 of the penal code, which have not been abrogated by that law and are still in force[1]. . . .

An attempt to form a monopoly contrary to article 419 of the penal code was condemned very recently in the case of the St. Astier lime company. This was an association "*sous nom collectif*." The plaintiff, Mallebray, demanded the dissolution of the association, on the ground that it was formed with the sole purpose of suppressing competition among the lime manufacturers of St. Astier. The defendants declared, on the other hand, that it was not an unlawful coalition, such as had formerly existed among them and had been dissolved by judicial decree (December 16, 1890), but a legally organized association. This combination was condemned, nevertheless, on the ground stated in the complaint.[2]

The French civil code contains certain provisions which are of significance with regard to the legality of industrial combinations, namely:

[1] A. . . . et autres c. Germain-Perret, Cour de Lyon, 21 avril, 1896, Journal du Palais, 1896, part ii, p. 164.

[2] The decision of the lower court, here cited, will be found in the report of the proceedings on appeal, cited *infra*, p. 35.

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Art. 6. Laws which concern public order and good morals may not be set aside by agreements of individuals.
Art. 1131. An obligation that is groundless or is based on a false ground or on an unlawful ground can have no effect.
Art. 1133. The ground is unlawful when it is prohibited by law or when it is contrary to good morals or to public order.

The provisions of the civil law have often been applied to industrial combinations by the courts, generally in connection with article 419 of the penal code, but sometimes independently where the penal code could have no application. A comparatively early case dealt with an oral agreement of five quarrymen near Liverdun not to deliver stone for the construction of a fort at a price lower than 3.50 francs per cubic meter. The court of Nancy, which tried the case, said that while article 419 of the penal code might not apply, yet this agreement was, nevertheless, "contrary to the principles of free competition," and a serious attack on commercial liberty. Hence the court declared it "null and of no effect, as having an unlawful basis." [1]

In the case of the iodine manufacturers (cited above, page 29, in connection with article 419 of the penal code), one ground for the decision was that it was an invalid agreement under article 1133 of the civil code. In the case of the phosphate manufacturers, cited above, p. 29, the lawfulness of the agreement was also questioned under the civil law, but the court declared that there was "no condition restrictive of the liberty to sell phosphates which the defendants were eventually engaged to furnish." In the case of the lime manufacturers of St. Astier (cited above, p. 33) the lower court had condemned the combination on the ground of article 419 of the penal code; on appeal the case was decided on the broader ground of articles 1131 and 1133 of the civil code. The court said, in part:

Adopting the motives of the first judges; considering, moreover, that it is not necessary, in order to pronounce the nullity of the association denounced by Mallebray, to establish that it unites all the conditions exacted for the application of article 419 of the penal code;

[1] Cour de Nancy, 15 déc., 1874, Journal du Palais, 1875, p. 1114.

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that it suffices to establish that the obligation of the various parties had an unlawful basis and purpose; that such was the case of the members of the association criticised, since it results from the facts and circumstances of the case that the said association had been formed only in order to forestall and prevent the foundation at Saint Astier of competing factories, which was contrary to the principle of liberty of commerce and industry; that thus the agreement attacked ought to be annulled also by application of articles 1131 and 1133 of the civil code[1] . . .

In considering the French law and the interpretation of the courts, the first impressions probably would be that they were characterized by uncertainty and inconsistency. It is doubtful, however, if this impression is correct. In the interpretation of the various rules established by the law, it is the effort of the courts, as has been shown by the above citations, to ascertain whether there is a combination exercising a monopoly power in a manner injurious to the consumers. The matter is skilfully summed up by Professor Lévy-Ullmann in a note to a recent case in the *Journal du Palais*. Professor Lévy-Ullmann chooses to call all industrial combinations "trusts," hence this word is used in the translation.

For the purpose of determining whether the trust submitted to their judgment constitutes or does not constitute a coalition of monopolists united to establish an artificial advance of prices, the judges seek first of all to discover whether the trust represents in the region where it operates the totality, or at least the majority in number and importance, of the producers of the commodity. Further, they take into consideration the area in which the syndicate acts; the more extended the area, the more vast the monopoly and the more difficult its destruction. The duration of the trust agreement furnishes still a third point to be considered. They examine, finally, its influence upon the course of prices; from the balance of prices, before and after the association of the producers, from comparison of these with the results of free competition, is obtained, with a quasi-mathematical precision, the tare of the trust. Number of syndicate members, area of action, terms agreed upon, result as to prices — such is the quadruple determination which is established by the most recent decisions.[2]

[1] Mallebray c. Compagnie générale des Chaux de Saint-Astier et autres, Bordeaux, 2 janvier, 1900, Journal du Palais, 1901, part ii, p. 225.

[2] Lévy-Ullmann, in Journal du Palais, 1901, part ii, pp. 225–231, note.

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Some of the other writers on this subject make a different analysis of the juristic elements of the offense prohibited in article 419. Thus Babled and Colliez agree in stating that the courts recognize the following four elements, *viz.*: (1) plurality of agents; (2) principal holders of the commodity; (3) a *de facto* change in the price, above or below what would have been effected by free competition; and (4) an agreement not to sell except at such prices.[1] It is true that Babled insists that the courts have erred in holding that there must be an express agreement, and he points out that the text of the law prohibits combinations "tending" to the effects which it desires to prevent.[2] Apart from verbal distinctions, which are of considerable importance in the practical application of the law to this or that industry, *etc.*, there are one or two points that may be noted more particularly. Article 419 furnishes protection against a combination of persons; but a fusion or consolidation, in general, escapes its prohibitions. Babled says that in such case, nevertheless, the parties may be attacked under articles 1131 and 1133 of the civil code,[3] and, indeed, that the courts in case of need should apply those sections *ex officio*.[4] In France, however, a fusion is an uncommon method of combination. If, on the other hand, the combination is made by establishing a company as a central agency, this, according to De Birague, will not enable the parties who have formed it, and who control it, to escape the law.[5]

Duchaine complains that the law is of little practical value in view of the almost undisturbed monopoly enjoyed by the sugar and oil combinations,[6] and Colliez calls it a "superannuated text," which does not correspond to the necessities of the present day. This writer in fact says that the benevolent attitude of the courts in recent years is "inspired perhaps by the desire to permit the French manufacturers to combat with equal weapons against their foreign competitors."[7]

[1] Babled, *op. cit.*, pp. 134–137; Colliez, *op. cit.*, pp. 461, 462.

[2] " . . . réunion ou coalition entre les principaux détenteurs d'une même marchandise ou denrée, tendant à ne pas vendre," *etc.* Code Pénal, art. 419.

[3] Babled, *op. cit.*, pp. 178, 179.

[4] Babled, *op. cit.*, p. 182.

[5] De Birague, *op. cit.*, pp. 90–93, 114.

[6] Duchaine, Les associations de producteurs, Paris, 1903, p. 479.

[7] Colliez, *op. cit.*, p. 470.

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IV. *Conclusion*

A comparison of the laws concerning combinations in the three chief commercial states of continental Europe affords a valuable basis for the inductive determination of the proper principles of jurisprudence. It is doubtful whether a study of the whole field would add very much to the solution of the problem.[1] The three

[1] The criminal code of Belgium contains a provision punishing the manipulation of prices by fraudulent methods only; Code Pénal, art. 311. *L'accaparement* is not a delict; Pandectes Belges, vol. i, p. 998. The provisions of the civil law are identical with those of France; Code Civil, arts. 6, 1131 and 1133. The courts have held that a cartell agreement which aimed to prevent a depression of prices was not invalid under the civil code; *cf.* de Leener, Les Syndicats industriels en Belgique, Bruxelles, 1903, p. 207.

The situation in Holland is the same as in Belgium. The criminal code penalizes fraudulent price manipulations (Wetboek van Strafrecht, art. 334), and the civil code invalidates contracts that are repugnant to morality or public order (Burgerlijk Wetboek, arts. 1371, 1373). As the two principal Dutch writers on cartells make no reference to the legal situation in Holland, it may be inferred that the legality of such combinations has not been called in question by the courts. *Cf.* Wibaut, Trusts en Kartels, Amsterdam, 1903; Schalk, Ondernemersvereenigingen, Leyden, 1891.

The situation in Italy is almost exactly the same as in Belgium; *cf.* Codice Penale, art. 293; Codice Civile, arts. 12, 1119, and 1122. There have been a few cases on this subject in which the legality of cartells has been uniformly upheld; *cf.* Rundstein, *op. cit.*, pp. 77, 78. In a case in Naples in 1900 the court said in part: "And in modern society, in which free competition is sanctioned by the prevailing principles and the right of association is recognized in full vigor, the exercise of this right of competition by associations cannot be regulated except by express legislation; for it is not possible to admit that the power of individual capital has the right to impose a limit on the variation of prices, and at the same time to deny this right to capital which is established either through association of capitalists or through association of producers of the same kind of goods." Corti d'Appello, Napoli, 2 luglio, 1900, Annali della giurisprudenza italiana, vol. 34, marzo, 1900, pp. 460–462.

The Spanish law is substantially the same as the Italian, both in the penal and civil provisions (Código Penal, arts. 557, 558, 593; Código Civil, art. 1116). There appears to have been a judicial determination of the meaning of the penal provisions, but this was with respect to a labor combination.

Hungary possesses no laws specially concerning cartells, but the courts have held that such combinations are invalid, if they attempt to advance the prices of their products, to diminish the prices of their raw materials, or to reduce the commissions of middlemen. Mandel, Entwurf zu einem Gesetz über die Kartellverträge, *Kartell-Rundschau*, 1904, p. 683.

The Russian law of 1903, according to Rundstein (*op. cit.* p. 35), is similar to the Italian penal law.

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countries considered furnish excellent types of three ways in which industrial combinations may be treated. The French law forbids such combinations as conspire to advance prices above a competitive level; the Austrian law declares no criminal penalty against combinations, but by declaring their agreements null and void withdraws from them the protection of the courts; the German law not only does not condemn them, but recognizes their complete validity at the civil law. It is undoubtedly true, as Rundstein says, that, except in America, there is no such thing as a cartell law proper;[1] the laws affect cartells only incidentally.

The tendency is certainly away from penal legislation, showing therein a striking contrast to recent developments in America. In several countries penal laws have been abolished within the last century, *e.g.* in Germany, Austria, Belgium and Italy. Most of the legislation on this subject to-day dates, however, from a period when combinations had not acquired the significance that they now possess. The only really noteworthy attempts at new legislation respecting industrial combinations have been made in Austria, and it is significant that the Austrian cartell bill of 1897–98 (cited above, page 26) did not contemplate their destruction, but their recognition and subjection to governmental supervision. A somewhat different attitude, it is true, was taken in the recently introduced bill, concerning the relations of the sugar-beet growers to the manufacturers. This bill provided that all *rayon* cartells, or agreements on the part of the manufacturers to divide the field, should be null and void, as well as all boycotting agreements on the part of the beet-growers; and it also provided penalties for those who should attempt to put such agreements into effect by intimidation or force.[2] This is a return in the policy of the government to the principles established under the prevailing system of law.

Positive conclusions with regard to the merits of these different systems can not be attained by analysis of the laws alone. A very

[1] Rundstein, *op. cit.*, p. 36.

[2] Regierungsvorlage, Gesetz vom . . . betreffend das Verbot der Rübenrayonnirung und die Lieferung der zur Zuckererzeugung nöthigen Rübe, 1678 der Beilagen zu den stenogr. Protokollen des Abgeordnetenhauses, XVII Session, 1903. *Cf.* Walker, The Sugar Situation in Austria, POLITICAL SCIENCE QUARTERLY, Dec. 1903, vol. xviii, pp. 588–592.

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extensive knowledge of the social and economic conditions and of the practical working of the laws is equally necessary, but for this the data obtainable are as inadequate as the subject is elusive. It is an easy and obvious criticism that, whether combinations are liable to criminal penalties, as in France, or to a declaration of nullity at the civil law, as in Austria, or have full validity, as in Germany, they flourish in all three countries. The vital question is whether combinations are as inimical to the public welfare in one country as in another, and to what extent the legal system may account for such differences as may exist in this respect. In this connection, also, it would be proper to study the powers and vigilance of the public administration in preventing abuses. These subjects are beyond the scope of the present inquiry, but proper information on these points might considerably alter conclusions drawn from the laws.

According to the French law industrial combinations *per se* are not prohibited, but only combinations which commit certain acts held to be injurious to the welfare of the community.[1] An indiscriminate prohibition, in the face of powerful economic tendencies supported by wide-spread if not general consciousness in business circles that these tendencies are economically necessary and defensible, fails almost entirely in achieving its purpose. It overleaps the bounds of justice and expediency. It condemns the loose combination, while giving complete validity to the fusion. It condemns the good and the bad combination, without effectually restraining either of them. If the law aims to destroy monopoly, the loose combination is no more guilty than the consolidation. Monopoly, however, is practically recognized and established by the state in many ways. It is idle, therefore, to say that monopoly is wrong and must be extirpated whenever and wherever found; monopoly is a fact which often exists of necessity and which the law cannot destroy. The injurious element which has made both combination and monopoly odious is extortion, but this is not a necessary element of either of them.

It is the recognition of this fact that is the great merit of the French law. The French penal code, in prohibiting combina-

[1] The principle of "anti-trust" legislation in the United States is the prohibition of combinations in restraint of trade without qualification.

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tions tending to give a commodity a price other than that which would be fixed by free competition, aims to check and punish extortion, and that is a perfectly proper matter for criminal legislation, whether it is considered from the standpoint of jurisprudence or of political economy. The form of the law is doubtless crude and antiquated, but it has been saved by the skilful interpretation of the courts. It has one great fault, namely, that it is applicable only to a combination of persons. The evils which it seeks to punish, however, may be committed, and in these days of "trusts" are likely to be committed, by a combination of persons which the law does not recognize as such — by a combination which the law regards as a single person, *viz.* a corporation. This danger is not so great in France as elsewhere, but it forms nevertheless a theoretical defect in the law. In France the cartell organization is preferred to the consolidation, and if the law can be applied, as recent cases seem to indicate, to the central company (*comptoir*, *syndicat*) of a cartell, this objection to a large extent disappears.

In a similar manner the civil law of France recognizes the legality of combinations, provided their acts are not injurious to the public welfare according to the standard of free industry. This seems to be a much fairer and much wiser system than to declare them invalid without respect to their character or operation. Herein the French law, or rather the law as it is interpreted by the French courts, seems superior to the Austrian law as that is interpreted by the Austrian courts. It is true that the Austrian law declares that the agreements of a combination are null and void only in case they aim to raise the price of a commodity to the disadvantage of the public, but the courts have taken the position that this is a necessary result of such a combination, and that the question of the actual course of prices is irrelevant. As the law thereby withholds its protection from all combination agreements, whether harmless or injurious, it tends to degrade the former, and gives an opportunity to the unscrupulous to repudiate their engagements.

The German law does not make this mistake; it puts a cartell contract on the same basis as any other contract. The good cartells are allowed to pursue the even tenor of their way, the bad

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cartells are subjected to the various penalties and disabilities provided for all persons and associations under the criminal and civil law. In this respect, indeed, there seems room for improvement in more complete protection against cartell excesses, particularly against arbitrary treatment in the supply of commodities and against the demand of extortionate prices.[1]

The prohibition of extortion through excessive prices is not to be confounded with the legislative regulation of prices. Legislation fixing a "just price" is sometimes practicable and desirable, but it is not adapted to many branches of industry. While legislative regulation of prices is impossible as a general remedy, it seems none the less certain that the *crux* of the whole problem is the prevention of extortionate prices and not the prohibition of combination. If the price extortion of a combination is not destroyed by the competition it excites, it will not be destroyed by legislation against combination. It is easy to consolidate ownership. Where strong "natural monopoly" elements exist, competition is quite sure to be eliminated in the long run. The relief which is sought for the evils attributed to combinations may be obtained more effectively by directing attention to prices, and the remedies available are to be found, not only in the law, but also in administration and in public enterprise.

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[1] Rundstein states the situation as follows: "Inwieweit man die Praxis übersehen kann, werden die Kartelle durchweg als 'gut' und 'nützlich' bezeichnet: die Bezeichnung 'schlecht' wird nicht auf das Kartell als solches, sondern auf seine Missbräuche und Auschreitungen angewandt; es heisst also: Alle Kartelle sind gut und nützlich, schlecht und schädlich sind nur ihre Ausschreitungen." *Op. cit.*, p. 65.

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THE TAXATION OF FRANCHISES IN CALIFORNIA

THE supreme court of California has recently decided [1] that, under the provisions of the constitution of this state, the mere right to be a corporation is a taxable franchise. It has also sanctioned a method of determining the value of such a franchise, which makes it include any good will earned by the corporation. The mere right to be a corporation has often been taxed in California, since the adoption of the constitution of 1879, under that provision which defines taxable property so as to include franchises. The propriety of such a tax has always been questioned. But as such franchises have usually been assessed at a nominal sum, $150 to $1,000, or at approximately what it costs to acquire a charter, the matter has never been of sufficient importance to call for judicial action. The startling innovation introduced by this decision is that such franchises are placed strictly on a par, as to the method by which their value is to be ascertained, with the valuable special privileges granted to public service corporations and the like, with the practical result of including in the tax on the franchise a tax on the good will of corporations.

The method of assessment, which the court has approved, is to deduct from the total market value of the stock and bonds together the predetermined value of all tangible property, the remainder thus obtained being considered the value of the franchise.[2] This method, which has had the repeated sanction of the courts in the case of valuable special privileges like the right to use the streets for street railroads, is in no sense obligatory. The courts reaffirm

[1] Bank of California *v.* City and County of San Francisco, 142 Cal. 276 (February 18, 1904).

[2] The leading case is that of Spring Valley Water Works *v.* Schottler, 62 Cal. 69. There are a number of other cases of the same general tenor, which are cited in the case of the Bank of California just referred to and which will be found listed in Plehn, General Property Tax in California, American Economic Association Studies, vol. ii, no. 3. The supreme court of the United States sustained the principles upon which these decisions were based in the Pacific Railroad cases, 127 U. S. 1. The case of Horn Silver Mining Co. *v.* New York, 143 U. S. 305, is probably the leading case for the taxation of franchises of this character and is largely relied upon to sustain the present decision.

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the common rule that the valuation to be placed on property for the purposes of taxation is a matter entirely within the discretion of the assessor and the boards of equalization and is not subject to review by the courts except in the case of fraud. California has an almost typical general property tax law. All property is supposed to be taxable; the assessment is made by locally elected assessors in each county; equalization between individuals is made by the county boards of supervisors, between counties by the state board of equalization.

A brief summary of the case of the Bank of California will serve to make the situation clear and pave the way for an intelligent discussion of the principles involved. In the year 1900 the assessor for the city and county of San Francisco found that the Bank of California was possessed of land, improvements and personal property in the nature of money, notes and securities to the value of $5,156,905.08. Of this a portion valued at $2,311,774 was assessable for purposes of taxation, while the remaining portion, valued at $2,845,131.08, consisted of bonds and stocks of California corporations, not taxable under the laws of California, and of property not assessable in San Francisco, presumably because located elsewhere. The assessor found furthermore that the market value of the shares of capital stock issued by the bank was $8,100,000, and he decided that the difference between the aggregate market value of the stock ($8,100,000) and the value of all the enumerated property ($5,156,905.08) or $2,943,096.92 was the value of the franchise. This franchise he then valued for the purposes of assessment and taxation at the sum of $750,000.[1] The

[1] In explanation of the assessor's reason for putting a valuation of only $750,000 on property, namely the franchise, said to be worth nearly $3,000,000, it should be stated that although the law requires the assessment of all property at its full cash value, full cash value is supposed to mean practically value at forced sale, and the practice has grown up of taking from 40 per cent to 100 per cent of the known market values as the assessed value. The percentage chosen depends upon the character of the property. Money, credits, mortgages and the like are assessed at their face value, but a stock of groceries at about 40 per cent of inventory values, land at about 70 per cent of what is considered a fair market value and improvements at about 50 per cent of cost of replacement. The general average aimed at is about two-thirds of the value. Hence in arriving at the value of the franchise of the Bank of California the assessor presumably took two-thirds of $8,000,000 as the total assessment to be made; deducted from that the $5,000,000 of tangible property and called the remainder approximately the value of the franchise. This is a rough method of giving the bank the benefit of the prevailing under-asse

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case was carried into court by the bank and the assessment sustained. The decision was not unanimous; two out of the six justices dissented, mainly on the ground that the mere right to be a corporation is not a valuable franchise, or at most not worth more than it costs to obtain the articles of incorporation.

The courts have from first to last given themselves a great deal of trouble over the definition of a franchise and especially of a valuable franchise. For the most part these definitions involve legal subtleties of very little practical use to economists. The constitution of California requires that all property shall be assessed for purposes of taxation in proportion to its value. The mere right to be a corporation, if a valuable franchise, as it undoubtedly is, should be assessed in proportion to its value. Inasmuch as any five or more persons can obtain such a franchise in California for very moderate fees, it would seem that the value was fixed by the amount of those fees. The franchise when obtained is not vendible, hence it has no market value; it confers no monopoly, for the state stands ready to create as many more like it as may be desired, hence it has no monopoly value; and the sole remaining method of ascertaining its value is to inquire the cost of replacement. In this respect it is analogous to a deed, which may be regarded as having a cost value apart from the property to which it applies. The franchise of the Bank of California could probably be replaced for less than $5,000, including all attorneys' fees and contingent expenses. The assessment of $750,000 upon that franchise is therefore either very excessive or includes something besides the franchise. To an economist it seems to include the good will earned by the corporation in the course of its existence. The reason why the stock of the bank was worth some $3,000,000 more than all its tangible property is not to be found in the mere fact that the bank is organized as a corporation. Those millions represent the value of the high reputation, excellent business connections, age and dignity of the bank. If it surrendered its charter and reorganized as a copartnership, with the same officers and the present stockholders as partners, its good will would still stand as an asset worth $3,000,000 and its earnings would be as great as ever.

If the good will of a corporation can be assessed for purposes of

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taxation under the guise of a tax on its franchise, the good will of firms and individuals should also be assessed. Otherwise obvious discrimination will arise. But good will as such has not been deemed taxable property in California and to round out the system will probably require legislative action. Clearly then this decision represents a new departure in taxation, a new effort to bring intangible personal property under contribution for the support of government. It will be profitable, therefore, to record the events which led to this new departure, to review the history of franchise taxation in California in the past and to discuss the economic effect of the taxation of good will.

The movement which culminated in the assessment of the franchise of the Bank of California dates back to a suggestion made by the state board of equalization in 1890 to the effect that money on deposit with the banks was largely escaping taxation.[1] Under the law of California deposits in banks are taxable to the depositors, who are supposed to make return thereof to the assessor. This the depositors regularly fail to do, and consequently this property escapes taxation. The banks are taxable on their real estate and their "solvent credits," that is, their loans, from which they are allowed to deduct all money due to taxpayers in California, that is their deposits. That leaves the banks taxable on an amount approximately equal to their paid up capital and their surplus. The banks are not required to report to the assessor the state of private accounts, so practically all bank deposits evade taxation.

The assessors are constantly reproached for their failure to find and assess personal property, which is now only about 15 per cent of the total tax roll, although in the sixties it ran as high as 40 and even 50 per cent. Consequently they find a certain political advantage in casting about for new forms of personal property which can be easily reached and the taxation of which may be popular. Their endeavors in this direction have for the most part taken the form of a severer treatment of public service corporations and their franchises and of greater severity toward the banks. In 1896 they persuaded the bank commissioners to call for special statements

[1] See Plehn, *op. cit.*, p. 154.

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from the banks at the close of business on the Saturday preceding tax day, which is the first Monday in March. These statements have been called for each year since then. As these statements are published and take the form of a report by each bank to all the other banks of its condition at that time, they are not likely to be unfavorably drawn; and as the declarations made to the assessors a few hours later can be compared with these statements the former serve as a check on the latter. The immediate result was a marked improvement in the assessment of banks. The banks naturally did not look upon this severity with complacency. They protested that they should not be punished for the sins of their depositors, yet declared vigorously that they must protect their depositors. On account of the prevalent use of gold in common circulation in California and the almost complete absence of paper money in the hands of the people, there has been little inducement for the banks in this state to enter the national banking system, and many large banks were content with state charters. Almost immediately after the increase in the taxation of the banks in 1896, there began an exodus from the ranks of the state banks into the national banking system. There for a time the banks enjoyed considerable immunity from taxation, owing to certain defects in the law. These defects have since been remedied, bringing the California law on this point into accord with the system for taxing national banks which is approved in the federal statutes and has the sanction of the federal supreme court. The amendment by which this was accomplished was passed in 1899. The tendency to migrate into the national banking system then ceased.

The assessment of the good will of the banks under the guise of an assessment of the franchise is the culmination of the movement above outlined. It is the last step thus far taken in the effort of the assessors to reach, somehow or other, that obvious but illusive wealth recorded on the books of the banks but not taxable to the banks. There was probably no thought at first of extending the same principle to other corporations, but that follows so logically from the decision that this year all corporations whose stocks are quoted in the market will presumably be assessed for a franchise irrespective of whether they own any special

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privileges or not.[1] This leads us therefore directly to the history of franchise taxation in California.

The first constitution of California, that of 1849, contained only the simple proviso that: "Taxation shall be equal and uniform throughout the state. All property in the state shall be taxed in proportion to its value to be ascertained as directed by law." The law from that time on, including the political code adopted in 1872 (a part of the general codification to which all subsequent legislation takes the form of amendments), provided simply that corporations should be taxed as nearly as possible in the same manner as individuals or firms. The taxation of franchises did not become a distinct question until after the adoption of the constitution of 1879. This constitution defined property "to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership." The legislature after a vain attempt, during one year, to tax shares of stock in the hands of their owners, repealed that part of the statutes which referred to the taxation of corporations and introduced in its place the following academic declaration of what it wished the law to be:

> Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all corporate property, would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor.[2]

This passed the scrutiny of the court; and since then corporations have been taxed upon all their property, including their franchises, and the holders of shares of stock have been exempt.

The early assessments were upon valuable franchises of the nature of special privileges possessed by gas companies, water companies and other public service corporations. These assess-

[1] The reader will observe that there is another gap in the tax law here; corporations whose stocks are not on the market cannot be reached by the method approved by the courts.

[2] Section 3608 of the Political Code as amended in 1881.

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ments were promptly called into court; and in the series of decisions above cited it was held that such franchises were taxable and that a proper method of ascertaining their value was to deduct from the market value of the stocks and bonds the value of all tangible property owned by the corporation. These decisions still hold, in spite of the fact that an amendment to the constitution adopted in 1884 makes the right to use the streets for gas and water pipes a common, not a special, privilege. This method of assessment obviously results in a valuation which includes good will as well as the value of the special privileges enjoyed. The question whether the mere right to be a corporation was a taxable franchise was not involved in the earlier cases, but so far as the argument touches that point it seems to confirm the views expressed in the later decision. However, nobody at that time supposed that the framers of the constitution meant to include good will under the term franchise, and in practice it was not included.

The question at issue is one of constitutional interpretation. If we apply the test of usage and endeavor to ascertain the meaning attached to the term by the framers of the constitution, we find that the evidence throws some doubt upon the propriety of this recent decision. There are hundreds upon hundreds of instances in which the statutes of California apply the term franchise to special privileges, such as the right to run ferries, toll bridges, toll roads, railroads, *etc.*, to distribute gas, water, electric power, *etc.*, while there are only three, according to the best index, in which the term is applied strictly to a corporate franchise, and in none of these cases is such a franchise spoken of as a valuable right. When used elsewhere in the constitution itself the term clearly means a valuable special privilege. In the debates in the constitutional convention on the adoption of the article on taxation, most of the attention of the delegates was directed to the taxation of mortgages. Very little that is intelligible was said upon the taxation of franchises. Yet the term was introduced in the place it now holds in the very earliest report of the committee in charge of that section. The phraseology then ran: "all property, including franchises, capital stock of corporations and joint stock companies and solvent debts." The intention was, at that time, to establish the practice of taxing shares of stock, but to

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collect the tax from the corporations, not from the owners — a scheme early abandoned in the progress of the discussion. It is clear that the committee did not consider that franchises were included under the value of the capital stock — a position which they must have taken if they had classed among franchises the mere right to be a corporation. Where such a vague term is used by a convention or a legislative body, some concrete example is generally in the minds of those using it. From the debate it appears that the term called up in the minds of many of the delegates to the convention two specific instances. One of these was the franchise of the Spring Valley Water Works, the corporation which supplies San Francisco with water, the other was the ferry privileges of the railroad companies across the bay of San Francisco. The only delegates who saw anything less concrete in it were the representatives of the mining interests, who feared that it concealed an attempt to tax them twice: once in the county where they were located, on their mines, and again in San Francisco, where for speculative reasons they maintained offices, on their capitalization. The following is the only really lucid statement made in the course of the debates as to the meaning of this now vexed term:

As to this question of franchises, gentlemen don't seem to discriminate between a franchise that is worth something and one that is worth nothing. We do not propose to tax a franchise at any particular amount, but to tax each franchise in proportion to its value. There are many corporations whose franchises are worth nothing. There are others whose franchises are worth ten times the amount of property they own. Take a bridge company; the value of the franchise bears no proportion to the price of the bridge. Take a ferry; the same way. Take the case of a company with a franchise to lay down city gas, with the exclusive privilege; the value of the property bears no proportion to the value of that exclusive privilege. Take street railroads; what proportion do the cars, the old horses and track bear to the value of the franchise and the privilege of collecting tolls? They have the exclusive right to lay down tracks in certain streets. Now, they should all be taxed.[1]

[1] Speech of David S. Terry, at p. 837 of Debates and Proceedings of the Constitutional Convention of the State of California held at Sacramento in 1878; published by the State, 1881.

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In general a reading of the debates leaves the impression that it was the intention of the framers of the constitution to point out the necessity of taxing "franchises of great value," as one delegate called them. They did not have in mind under that heading the mere right to be a corporation. It is possible that the framers of the constitution and those who ratified it may have intended to include good will under the comprehensive phrase "all other matters and things, real, personal and mixed, capable of private ownership." If so the intention was never put into practice and was late in being discovered. But they certainly did not mean by the use of the term franchise to single out the good will of corporations alone for special taxation.

The decision of the court in the Bank of California case seems to have been dictated by a feeling that sound public policy demands the taxation of all property and that to exempt from taxation the good will of corporations, even though the good will of firms and individuals is not taxed, would set a dangerous precedent. It seems to have been felt that the discrimination resulting could be more easily remedied by extending the taxation to the good will of firms and individuals than by exempting corporations. We are thus led to a consideration of the general question of public policy involved in the taxation of good will.

It is probable that the legal theory of the general property tax logically calls for the assessment of good will as property and at a valuation as capital. If it does so, this is only one of the many instances in which the theory of the general property tax is at fault. The value of good will is indeterminate and uncertain. A fair assessment of so intangible an item of personal property as good will is an unattainable ideal. Any attempt to tax it upon a valuation, as if it were capital, opens a wide door to official corruption and even with the best of intentions on the part of officials results in inequalities and injustice. Such an attempt introduces a large element of uncertainty into the tax system and sins against the canon of certainty. It works moreover a decided injustice, for the tax on good will is a burden on the taxpayer, while a tax on property, like real estate, has long since been capitalized and has ceased to be a burden on present taxpayers.

If this be the true legal theory, it runs counter to the popular

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theory upon which the property tax rests. The tenacity with which the American people hold to the property tax, with all its admitted faults, is partly the result of inheritance and partly the result of prejudice. But the prejudice has its roots in economic facts. The popular theory is inconsistent with the legal theory in that the former demands the taxation of durable, comparatively fixed or permanent property, of that property which does not frequently change hands and whose value is comparatively stable, while the latter demands inexorably the taxation of all property. There is the strongest popular prejudice against the taxation of that which is earned by the sweat of one's brow or that which is the result of personal qualities. This is the prejudice which has rendered every attempt to introduce an income tax a failure.

The theory of the property tax as conceived by the majority of the people is objective and involves no personal or subjective considerations. They hold that "property should be taxed," although they may occasionally say that "every citizen should be taxed in proportion to his property." Every attempt to intermingle personal or subjective ideas in this real or objective system of taxation is foredoomed to failure because it runs counter to this deep-seated prejudice. It is on this account that the attempts to grant an abatement for debt fail, as well as because the two systems will not intermingle. Wherever the property tax maintains its supremacy, it is the property under the jurisdiction of the state that contributes to the support of the government, not the citizens who compose the state. This is true in spite of the fact that the only source of public revenue is the industry of the people. The government becomes to the extent of the annual taxes a part owner in the property taxed, and although it permits the citizen to handle for a time its share of the revenue the property yields, yet it permits him to remain in the enjoyment of his property only on the condition that he shall at the proper time render up the dues of the state on its portion or interest in the property. The government has foregone its claim to personal services of the citizens except in time of war, for jury duty and for purposes of electing officers. The latter duty, by a strange confusion of ideas, has come to be regarded as a right or privilege, a franchise, the

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propriety of taxing which was actually discussed in the case which has been made the text of this article. But the state continues its claim on property and the taxes thereon are practically quit-rents. The capitalization theory of taxation is well known. Taxes on durable property or property which is of relatively fixed value are capitalized, and an amount equal to such capitalized value is deducted from the current value at which such property changes hands. These taxes cease to be to any considerable extent a burden on the present owners. The citizen has become accustomed to this silent partner in his property, the state; but he is not accustomed to making any personal sacrifice for the support of government. Most of the forms of intangible personal property which are escaping taxation, in spite of the vigorous efforts of the courts to sustain the theory that all that can by any possibility be construed as property should be taxed, are of such a character that their taxation would involve a distinct personal burden on the taxpayer. This is distinctly the case with good will. It is not durable; it is mainly an attribute of a person or a group of persons; and it is something in which it is hard to conceive of the state as a partner.

Certainty, expediency and economy should play a far larger part in the determination of our tax system than the futile attempt to apply a rigidly logical interpretation of a theory which runs counter to strong social forces and prejudices and which works injustice where justice is sought.

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SUFFRAGE LIMITATIONS AT THE SOUTH

THE committee on political reform of the Union League Club of New York City made a report in December, 1903, on suffrage in eleven states, *viz.*, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Arkansas, Mississippi, Louisiana and Texas. The report consists of (1) a statement of the provisions of the laws of these states affecting suffrage; (2) a statistical table showing the ratio of total vote to population and the average vote for congressmen in 1892 and 1902 in each of these states and in Iowa and Massachusetts; and (3) an argument on the questions considered to arise upon these facts under the constitution of the United States. It is pointed out that suffrage is greatly restricted by law in the southern states, and it is argued that the restrictions constitute a denial of the right of citizens of the United States to vote within the meaning of the fourteenth amendment. It is contended that the marked decrease in the average vote for congressmen in the South, from 1892 to 1902, is due primarily to the limitations upon the suffrage, and that these limitations were intended to eliminate the negro vote. It is shown that the average vote for congressmen is smaller in the South than in the two states "taken as fair samples of the northern states." It is accordingly asserted, among other things, that the white population of the South is enjoying an unfair advantage, and it is argued that, as such advantage arises from a denial of the right of citizens of the United States to vote, the representation of the South in Congress and in the electoral college should be reduced. In view of the standing of the Union League Club as a political organization, its effort to make a full and systematic statement of the facts and of the law bearing upon them deserves careful consideration.

In the constitutions of five of the states discussed, *viz.*, Georgia, Florida, Tennessee, Arkansas and Texas, the report fails to find restrictive or unfair clauses; and no complaint is made of the statutes of these states, except that in Tennessee and in Florida the Australian ballot laws, in practice, exclude illiterates from

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voting. These ballot laws, however, are now in such nearly universal use throughout the United States and are so generally approved by public opinion, that an objection to their acceptance and enforcement at the South seems hardly reasonable.

In the remaining six southern states suffrage is restricted by constitutional provisions. Alabama is a fair type of this group of states and, for convenience, that state will be noticed first and with some detail.

The revised constitution of Alabama went into effect November 28, 1901. The statement of its provisions in the committee's report is inadequate, and wholly fails to bring out some of the most significant features of its suffrage clauses. The constitution contains two distinct plans, one temporary and the other permanent. The temporary plan remained in force only until January 1, 1903:[1] but under it all persons registered obtained certificates which entitled them to vote for life, provided they complied with the other requirements of the constitution.[2] Under this temporary plan, persons possessing the prescribed qualifications as to age and residence, and not convicted of crime, were entitled to register (1) if they had honorably served in the war of 1812 or in the Mexican, Indian, Civil or Spanish war; or (2) if they were lawful descendants of persons who honorably served in the Revolutionary war, in the war of 1812, or in the Mexican, Indian or Civil war; or (3) if they were persons of good character and understood the duties and obligations of citizenship.[3] The permanent plan, in substance, admits to registration those persons only who possess educational or property qualifications, *viz.*: (1) those who, unless physically disabled, can read and write and have been regularly engaged in some lawful employment for the greater part of the preceding twelve months; and (2) those who own at least forty acres of land on which they reside, or own real or personal property assessed for taxation at a valuation of at least $300, on which the taxes for the previous year have been paid.[4]

Apart from the failure clearly to distinguish between the temporary plan and the permanent plan, the report fails to appre-

[1] Constitution of Alabama, secs. 180, 181.
[2] *Ibid.*, sec. 180.
[3] *Ibid.*, sec. 187.
[4] *Ibid.*, sec. 181.

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ciate at least two important restrictions on the suffrage. Registration is only one of the requisites for gaining the right to vote, and the two features of the constitution that have been overlooked, *viz.*, the poll tax and vagrancy clauses, do much more to restrict suffrage than do any of the registration provisions noticed in the report.

Elections occur in November. In order to be entitled to vote at that time, any person who is registered must have paid, by the first day of the preceding February, his poll tax, if subject thereto, for the year 1901 and each subsequent year.[1] It is made a felony to pay the poll tax of another,[2] and, aside from this, the requirement of payment nine months in advance of elections, before the heat of the campaign begins, makes it practically impossible to procure third persons to make the payment from improper motives. In the actual operation of the law it has been found that many who obtained life certificates of registration under the temporary plan have not paid their poll taxes and have therefore been unable to vote.

To entitle one even to registration he must have resided in the state two years, in the county one year, and in the precinct or ward three months next preceding the election at which he offers to vote.[3] This bars nomads and floaters.

Furthermore, the permanent plan prescribes as a condition to registration, under the educational test, regular employment for the greater part of the preceding twelve months and, under the property test, either residence on and ownership of a homestead of at least forty acres or the ownership of property taxed upon a valuation of at least $300, upon which the taxes have been paid.[4] So far as concerns persons not registered prior to 1903, these provisions alone bar vagrants and all who are not substantial, settled citizens.

The stress of the criticism urged in the report is on the provisions regarding registration; particularly on the so-called "grandfather" and "good character" or "understanding" qualifications for registration under the temporary plan. Oddly enough, practically nothing is said as to the two provisions of the constitution

[1] Constitution of Alabama, sec. 178.
[2] *Ibid.*, sec. 195.
[3] *Ibid.*, sec. 178.
[4] *Ibid.*, sec. 181.

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which more effectually than all others combined bar negroes from voting. It is probable that no objection can ever be made to the validity of the poll tax and vagrancy clauses, and unquestionably they apply alike to whites and blacks.

Under the conditions existing in Alabama in 1900 and 1901, during the campaign for a constitutional convention, those who favored a revision of the suffrage felt it necessary, in order to carry the call for the convention, to promise those white men who then had the right to vote (1) that they should not be disfranchised by the terms of the new constitution, and (2) that the constitution should be submitted to the voters for ratification or rejection. The Democrats put these pledges in their platform, and the temporary plan is the fulfilment of the promise not to disfranchise white men. If both pledges had not been made, the convention would probably never have been held. If the constitution had not been framed as promised, it probably would never have been ratified. The precedents for preserving the right to vote to citizens who already had it were furnished by Massachusetts and Maine. In the twentieth amendment to the Massachusetts constitution, by which an educational qualification for suffrage was introduced, in 1857, it was declared that "the provisions of this amendment shall not apply . . . to any person who now has the right to vote"; and Maine made a similar provision in article 29 of its constitution, adopted in 1892.

How to get rid of the venal and ignorant among white men as voters was a far more serious and difficult problem than how to get rid of the undesirable among the negroes as voters. While it was generally wished by leaders in Alabama to disfranchise many unworthy white men, as a practical matter it was impossible to go further than was done and secure any relief at all. Hence, as the next best thing, the evils of ignorance and venality among the white electorate were reduced to a minimum by making their further lease of life as short as possible.

The long sway of one party had, naturally, put undue political power into the hands of unworthy white men. To get a new constitution at all, it was necessary to appease this element. This was done by giving those who then had the right to vote the right of registration under the temporary plan. To rid the state even-

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tually, so far as could possibly be done by law, of the corrupt and ignorant among its electorate, white as well as black, the poll tax and vagrancy clauses were put into the constitution. The evil of having only one party was fully recognized, and it was believed that by securing a plan which would eventually give the state a clean and intelligent electorate, the way was being opened for white men to divide into parties and to vote according to their convictions on economic and public questions.

The predominant purpose of the movement was not to tie the negroes' hands, but to untie the hands of the best of the white men. By means of the prevailing scheme of settling political contests in white conventions and primaries, the negroes had been practically eliminated as an active factor; they were only occasionally appealed to when there were local splits in the Democratic party. So long, however, as there remained a legal possibility of the ignorant gaining control of the local governments in general elections, the intelligent were willing to subordinate their differences of opinion and to continue the operation of a system which, while it had defects, assured their effective political domination in their own communities. Nothing but freedom from such a legal possibility and a thorough, practical test of the new system will persuade the mass of intelligent voters to divide, as they desire to do. The horrors of Reconstruction are still too fresh in the memory of the South for it to be otherwise.

However high the motives of the Union League Club's committee and of those who support the scheme proposed in the committee's report, their conduct is only putting a stumbling-block in the way of those "standing next to the burden," who want to do the best they can to solve a problem far more difficult than the writers of the report seem ever to have dreamed it to be. Their criticisms of the movement for a restricted suffrage in the South show a lack of sympathy with its real purposes and a misunderstanding and impeachment of the motives of men whose intentions are as worthy as those of their critics. Such a plan as that in the Alabama constitution is not selfish; it is merely practical. It puts a premium on good qualities of citizenship and is well calculated to attain the best and fairest results, not for white men alone, but for negroes also. The criticism of the

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report is directed at the temporary plan without appreciation of its temporary character and without recognition of the fact that it was placed in the constitution for the purpose of securing the permanent plan, framed after the example of Massachusetts and other northern states. Such possibilities of unfairness as were contained in the temporary plan were largely neutralized by other and permanent provisions, which the report has failed to note.

(1) The vagrancy clauses are absolute and bear upon white men and black men alike.

(2) The poll tax clause makes no discrimination and eliminates from the voting lists many who have been registered.

(3) Death and removals from the state will gradually entirely purge the registration lists of all others whose names were unfairly or unworthily placed there prior to 1903.

The principal remaining criticism of the suffrage plan is that registration is in the hands of registrars who have power to discriminate against negroes in the administration of the law. If this criticism is well founded, it is also applicable to the registration system of every other state, including the states of New Hampshire, Connecticut, Massachusetts, Maine, California and Washington, where educational tests similar to the one in Alabama's permanent plan are applied. Indeed, there is no law which is not capable of abuse in administration. It is true that under the temporary plan there was one qualification for registration which was vague and peculiarly subject to discrimination in application, *viz.*, the "good character" and "good citizenship" clause.[1] Up to January 1, 1903, the registrars had great latitude in determining who were good citizens or of good character. In granting life certificates of registration under this clause there was doubtless discrimination against negroes and in favor of white men; but the power so to discriminate was given in fulfilment of the political pledge made by the Democrats to white men who had the right to vote when the constitution was adopted. And if we are to draw inferences, as the writers of the report have done, from the election figures of 1892 and 1902, their own sta-

[1] Constitution of Alabama, sec. 180, subdivision 3.

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tistics show that in Alabama not all of the disfranchised in the latter year were blacks. The negroes constitute 45 per cent of the population of the state. The average vote for congressmen in 1892 was 25,846. In 1902, the year after the new constitution went into effect, the average vote for congressmen was 10,172. The decrease was thus more than 60 per cent.

It may be that under the temporary plan some worthy negroes were denied registration. But every man to whom it was denied had the constitutional right to appeal to the courts, upon simple petition, without expense to himself, to enforce his right to register.[1] This is an unusual and specially favorable protection, which appears to be granted in no state constitutions except in those of Virginia and Alabama; and that this constitutional right of appeal, when resorted to in registration cases, has to some extent, at least, been effective in Alabama, is evidenced by the case of the State *v.* Peter Crenshaw,[2] wherein, upon application to the court, a white jury protected a negro in his right to registration which had been denied him by the registrars.

Up to the present time all attacks upon the constitution in the courts, both state and federal, have failed.[3] These attacks, it is to be noted, were not aimed at the provisions of the permanent, but at those of the temporary plan; in other words, at the very suffrage provisions which the Union League committee's report criticises. As a matter of fact, even if the supreme court of the United States were to declare the temporary plan unconstitutional, its decision, so far as Alabama is concerned, would be of little effect. It has already been noted, above, that the negroes are not deprived of the privilege of voting so much by the registration provisions of the temporary plan as by the poll tax and vagrancy clauses of the constitution which bear equally upon whites and blacks and which have not been attacked. If the temporary plan were declared unconstitutional, the chief effect of such a decision would be to aid in purging the registration lists, more quickly than nature would otherwise do, of those who were enrolled under the temporary plan without possessing the qualifications prescribed by the permanent plan.

[1] Constitution of Alabama, sec. 186, subdivision 6.

[2] 138 Alabama, 506.

[3] Giles *v.* Harris, 189 U.S. 475; Giles *v.* Teasley, 136 Alabama, 164, 228; 193 U. S. 146.

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The general criticisms of the permanent plan contained in the report, especially those relating to its constitutionality, may be disregarded as foreign to this discussion, because they are not aimed at anything peculiar to the South and because the permanent plan affects negroes and white men alike.

The whole argument of the report rests upon the premise that there has been a suppression, and an unfair suppression, of the negro vote. The sole facts presented to prove suppression are statistics, which show a large decrease in the average and total votes in elections for congressmen in southern states from 1892 to 1902 and a much smaller average vote there, particularly in 1902, than in Iowa and Massachusetts. Assuming that the figures quoted are correct, the conclusion of the report by no means logically follows. The report itself shows that in 1902 the average vote for congressmen in Georgia — one of the states, be it noted, against which no complaint is made and in which the laws are admitted to be fair and without discrimination against the negro — was much smaller than in Alabama; smaller, in fact, than in any southern state except Mississippi. In Georgia, according to the report, the decrease in the average vote from 1892 to 1902 was from 19,311 to 3,577, or more than 80 per cent. In the other states without constitutional restrictions (with the exception of Texas, for which the figures are not given in 1892) the decreases were: in Florida, from 17,711 to 5,446, or 69 per cent; in Arkansas from 23,026 to 5,632, or 75 per cent· and in Tennessee from 30,632 to 15,211, or 50 per cent. The average decrease in this class of states was 68.5 per cent. In the states with constitutional restrictions the decreases during the same period were: in Virginia, 56 per cent; in North Carolina, 34 per cent; in South Carolina, less than one-half of one per cent; in Alabama, 60 per cent; in Mississippi, 69 per cent; and in Louisiana, 80 per cent. The average decrease in this class of states was 50 per cent. The explanation of these changes is obviously not to be found in constitutional restrictions. What is the explanation?

In the first place, the votes were small because there were, except to a negligible extent, no opposition candidates; and in the second place, as the political system resorted to in the post-Reconstruction period has become more firmly established, less and less attention has been given to the elections themselves.

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It may be said that, while this is true, the negroes failed to vote because they knew it would be useless. If this be admitted, still the single fact that there were no opposition candidates, and hence no contests to bring out a full vote, deprives the figures of the probative effect sought to be given them by the report. It is doubtless true that the Republicans knew that if they had nominated candidates, they would not have won; but this does not prove that it would have been necessary to resort to fraud or suppression to defeat them. On the contrary, so long as the two national party policies were what they have been (except during McKinley's administration) for many years past, the nomination of local candidates by Republicans in the South would have been useless except in a few scattered places. Republican nominations actively supported under such conditions would merely have solidified more firmly the large mass of voters in the Democratic ranks, and this would have meant defeat of the Republicans on a fair vote.

Again, it is a mistaken assumption of fact to say, as does the report, that in their present temper the negroes as a body are anxious to vote.

The true explanation of the small and decreasing average vote in southern elections is that political exigencies have driven the people in the South more and more into the habit of settling finally in Democratic primaries and conventions, particularly in primaries, whatever political differences exist among them. The result is that it is now no unusual thing for the number of votes cast in a general election to fall to a very small proportion, sometimes as low as from ten to twenty-five per cent, of the vote cast in the nominating primary for the same candidates. The questions at issue having been settled in the primary, the election itself is a mere legal formality, to which no more attention is given than is necessary to record the result of the primary. Thus it has come about that people in the South have accustomed themselves to take part in the choice of their officials almost entirely by the indirect method of sharing in the selections of the candidates of one party.

Doubtless it can also be shown by statistics that in those districts in northern states where elections are uncontested by reason

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of the overwhelming predominance of one party, the average vote cast in congressional elections is no larger than that shown in the Union League committee's report for several of the southern states. This is certainly true of some such districts. For instance, in 1902 the total vote in the ninth New York district was 13,910; in the fourth Illinois, 15,865; and in the fifth Illinois, 13,913. In the same year the average vote of the congressional districts in Tennessee was 15,211; in North Carolina, 19,749; and in Texas, 21,905. Furthermore, the excess of the average vote for congressmen in some of the states of the far West over that cast in the East is much greater than the excess shown by the report in northern over southern states. Mr. Charles A. Gardiner, in discussing this disparity in average congressional votes, has pointed out that

> Rhode Island's vote is 1.59 times as great as Alabama's, but South Dakota's is 3.39 times as great as Rhode Island's. Vermont's is 2.22 times as great as Florida's, but Utah's is 3.01 times as great as Vermont's. Maine's is 2.36 times as great as Georgia's, but Colorado's is 3.48 times as great as Maine's.

It would be easy to suggest circumstances which explain, in part at least, the small votes in the New York and Illinois districts and the large votes in the far West, and the showing here made is perhaps not of special significance; but the figures given are worth referring to, because they illustrate the fallibility of conclusions based solely on the numbers of votes cast.

Virginia, North Carolina, South Carolina, Mississippi and Louisiana each have a constitutional suffrage scheme similar in general purpose to Alabama's, but varying in details. An examination of the report's criticisms as to these states will show that they may be answered by what has been said as to Alabama. In all of them there is an educational qualification for registration and, aside from the educational and property qualifications, the parts of their schemes objected to, with the exception noted hereafter in the case of Mississippi, are temporary in character.

The two clauses upon which practically all of the complaint in the report is concentrated are the "grandfather" and "good character" or "understanding" clauses. Four states have the

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"grandfather" clause, *viz.*, Virginia, Alabama, North Carolina, and Louisiana. In Virginia the right of registration under this clause extended to soldiers and sailors who served in time of war prior to 1902 and to their sons, while in Alabama the right was not limited to sons but extended to lawful descendants. In Alabama the clause ceased to be operative January 1, 1903, and in Virginia, December 31, 1903. The North Carolina constitution contains a square educational qualification, but up to December 1, 1908, it excepts from the operation of the educational requirement persons who had the right to vote prior to 1867 and their lineal descendants. In Louisiana a similar clause, extending, however, only to sons and grandsons, ceased to be operative in 1898.

So far as the war service qualification is concerned, it is to be noted that in every southern state some negroes could have registered under it. In Alabama, for instance, one out of three regiments from the state in the Spanish war was composed of negroes; and if we may take as a basis of estimate the number of negroes in the South drawing pensions, a great many of them served in the Civil war. It is not unusual in northern states to reward war service by favorable provisions in suffrage and public service laws. Massachusetts has for many years made such a discrimination in its election laws.

The real "grandfather" clause, based on descent from a voter, has never existed except in North Carolina and Louisiana. In the former it will end in 1908; in the latter it ended in 1898. It was probably suggested to these two states by the provision in the Massachusetts constitution making the right to vote in 1857 a sufficient qualification for registration. In North Carolina, down to 1835, "free persons without regard to color claimed and exercised the franchise,[1]" and the free negro population of that state in 1830 was 19,543.

There are "understanding" or "good character" clauses in the constitutions of four states, *viz.*, South Carolina, Alabama, Virginia and Mississippi. In South Carolina they ceased to be operative in 1898, and in Alabama and Virginia in 1903. In Mississippi it is a part of the permanent plan that one who can-

[1] State *v.* Manuel, 4 Devereux and Battle, N. C. Law Reports, p. 25.

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not read the constitution, but can understand a section of it when read to him and give a reasonable interpretation thereof, is entitled to registration if he possesses the other usual qualifications. This clause is not temporary merely, but the possibility of unfair use of it is limited by poll tax, taxation and vagrancy clauses, similar to, but more restrictive than, the corresponding clauses in the constitution of Alabama; and Mr. John Sharp Williams has stated on the floor of Congress that there are more negroes than there are white men who get admitted to the suffrage and vote in Mississippi under this "understanding" clause — presumably because of the unwillingness of white men to run the risk of displaying ignorance. It may be noted, too, that the suffrage provisions of Mississippi are no more capable of abuse than those of Vermont, where for more than a century the constitution has required that voters must be "of a quiet and peaceable behavior," and where a statute provides that "no person shall be admitted . . . to vote at an election until he has obtained the approbation of the board of civil authority of the town in which he resides." And it is to be further noted that the attack on the validity of the suffrage clauses of the constitution of Mississippi has failed in the court of last resort.[1]

It is not asserted by any one that the power of Congress, under the fourteenth amendment, extends further than to reduce representation in proportion to the number of male citizens of the United States, twenty-one years of age, whose right to vote is wholly denied, or is partly denied, *i.e.*, abridged. In the exercise of this power by Congress, the number of votes cast in general elections cannot be taken as a test of the number who have the right to vote unless it is established that in all the states the proportion between those actually voting and those denied the right to vote is the same. If the proportion voluntarily refraining from voting is variable in the different states, then the number of votes cast cannot be made the basis for ascertaining how many were denied the right to vote. In fact, as has already been shown, the number of votes cast in general elections at the South does not enable us to ascertain the number of citizens who share in the selection of their representatives. Still less does it

[1] Williams *v.* Mississippi, 170 U. S. 213.

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enable us to determine what proportion of the adult male population has been legally disfranchised. Between 1892 and 1902 the decrease in the average vote for congressmen was 18.5 per cent greater in those states in which no constitutional restrictions exist than in those states in which such restrictions have been adopted. As the restrictions were not the operating cause in the former group of states, the decrease in the latter group may justly be attributed to other contemporaneously operating causes.

Except as regards participation in rebellion or other crime, the fourteenth amendment makes no distinction between the causes which may induce the denial of the right to vote. Whatever the cause may be, Congress is not empowered to do more than penalize the denial by a proportionate reduction of representation. It appears to be the opinion of the writers of the report, and it is certainly the view of Mr. Crumpacker, that reduction should be as rigorously imposed in the case of fair as in that of unfair denial: in case of denial because of ignorance as in that of denial because of color. It is asserted that it is unfair to allow each state representation in proportion to the sum of both voters and non-voters, when the proportion of the disfranchised varies in different states, because this gives the votes of one state greater weight in federal affairs than the votes of another state. Even though, for the sake of argument, this point be conceded, and though it be also conceded that Congress has the constitutional power to make the change upon such grounds as are furnished by the new southern constitutions, those who propose to change the basis of representation from the basis of population, on which it has so long rested, assume the burden of showing that the new basis would be better than the old.

There has been much vague talk about the ease of determining the exact number of legal electors in each state; but excluding suggestions of what is merely fantastic or obviously impossible of execution, no definite scheme is proposed by the Union League committee or has been proposed by others except to take the actual vote cast in federal elections. A serious, if not fatal, objection to such a scheme is that it would furnish a very strong motive for fraud in elections. It is easy to ascertain with a fair degree of accuracy the population of a state.

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So many other things than the basis of representation are involved, there are so many motives for getting at the truth and there are so many ways of checking misstatements, that we may regularly assume that the census is fairly correct. On the other hand, if by law representation were placed on the basis of the number of votes cast, the dominant party would exert itself to the utmost in padding the election returns of the community where it was in control. And in districts where parties are fairly equal, the natural desire of each party to keep its antagonists within strictly legal limits, which now produces a wholesome vigilance and control, would be modified by a common interest in making the election returns show as large a vote as possible. There could hardly be a greater inducement to corruption or a higher reward to tricksters. Assuming that election results are now fairly ascertained and reported in Iowa and Massachusetts, are we so sure that ballot boxes are not stuffed in Ohio and Pennsylvania that we may be certain that, if representation were based on the number of votes, Ohio and Pennsylvania would not soon have more than their fair share of congressmen and electoral votes? If not, it is hard to see how, by the scheme proposed, Iowa and Massachusetts would gain relief from the form of injustice of which the report complains.

In any attempt to apportion representation on the basis of the number of votes cast, a further difficulty would perhaps be encountered by reason of the fact that in a few western states women vote in federal elections. The fourteenth amendment of course applies to the denial of the rights of male citizens only, and for purposes of comparison it would be necessary to ascertain what proportion of the total vote in these western states was cast by men.

Restrictions upon the franchise have long existed in a number of northern states, particularly in New England. To change representation now from the basis of population to that of the average vote cast would patently be a punitive measure aimed at the South. If the principle of representation on no other basis than the number of votes cast is sound and wise, why has not a corrective been applied before? The policy of rewarding those who learn to read and write by giving them a vote has been per-

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mitted to remain in operation in New England for many years as an influence tending to reduce illiteracy. Now when the South, still so far away from victory in the great war it is making against illiteracy, offers the same premium to her citizens as New England has long and with profit offered, it is proposed either to punish her by loss of influence in Congress and in the electoral college or to force her, in order to retain her proportionate representation, to restore to ignorance the political power which she desires to offer as a premium upon intelligence. And this alternative is to be imposed upon her because, in order to establish an educational qualification, it was necessary for her, as it was necessary in 1857 for Massachusetts, to preserve the rights of those illiterate persons who already had the suffrage.

That all is wise, that all is fair, or that all is prudent in the South, no one can truthfully assert. But may not the South ask from everyone time and full consideration of all the facts before the verdict of the American people upon her peculiar suffrage problem is made up?

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POLICE REMOVALS AND THE COURTS

POLICE Commissioner McAdoo, of New York city, is reported to have said, last autumn, that "the courts are turning back in a steady stream officers and men and nullifying police trials ending with dismissal," and that "there should be some remedy for this state of affairs, which [is] at once subversive of the discipline of the force and a heavy expense to the tax-payers." These statements appeared in *The Chief*, under the caption: "Mr. McAdoo explains his court martial." They were called forth by the publication of what the commissioner termed "a rather misleading account" of "a purely tentative . . . suggestion," made in an interview with press representatives, "as to what such remedy should be." [1] In that interview, as reported in *The New York Times*, Mr. McAdoo said that "many of the judges of the higher courts with whom I have talked have agreed with me that the finding of fact by the police commissioner should be final." [2] This means that many of the judges of our higher courts have unofficially declared themselves in favor of a strongly centralized administration, at least for the police department. It will be of interest, therefore, to see what official attitude, if any, the judges of our higher courts have taken towards the development of a strongly centralized administration not merely in this department but in city government generally.

Under the American system of government two forms of administration obtain, namely, the centralized, of which the national administration is the best example, and the decentralized, of which the state governments are representative. Of the official service in the national and in the state governments, respectively, Mr. Bruce Wyman, in his work on *Administrative Law* (section 52), says that in the former "membership is given by appointment and taken away at discretion," while in the latter "membership is acquired by election and lost only by judicial process." When, however, we inquire into the origin of this latter rule, we

[1] *The Chief*, vol. viii, no. 371, Nov. 5, 1904, p. 1.
[2] *The New York Times*, Oct. 20, 1904.

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find that it is purely statutory. Despite the fact that by our theory of state government all authority not expressly granted to other governmental authorities is reserved to the legislature, it is the rule of the common law that, wherever an authority has the unrestricted power to appoint to office or position the term or tenure of which is not fixed by law, the power to remove is implied as incident to the exercise of the power to appoint, and always exists unless restrained by statutory enactment.[1] Not only is this the common law rule, but it has been adopted into the constitution of the state of New York.[2] The constitution, however, permits the legislature to establish a fixed term, and as a matter of fact, such a term has been established for elective offices and not infrequently for appointive offices as well. This definite term has given rise to the idea that the person who has been legally elected or appointed and who has taken actual possession has a right to the office; and this right to the office, when acquired, has been strengthened and fortified with the development of statutory restraint over the power of removal. In the state of New York four distinct phases or periods of such restraint may be distinguished:

1. Prior to 1873, a very limited effort to regulate removals: the supreme court attempting, by the exercise of its prerogative powers, to prevent abuse of the discretionary power of removal.

2. Beginning with 1873, as a result of statutory provisions, a more marked and extended effort to retain efficient public servants by an enlarged control of removals.

3. The establishment of the merit system, in 1883, in an effort to control the filling of minor executive positions.

4. The application, in 1898, of the control of removals to the entire classified civil service.

As it is the function of the judiciary to interpret the laws, *i.e.* to ascertain the intent of the legislature from the statutes it has enacted, the courts in their turn have entered upon the scene of conflict, not to give new rights, but to determine what if any are the

[1] People *ex rel.* Cline *v.* Robb, 126 N. Y. 180; People *ex rel.* Sims *v.* Fire Commissioners, 73 N. Y. 437.

[2] Article 10, sec. 3, reads: "When the duration of any office is not provided by this constitution it may be declared by law, and, if not so declared, such office shall be held during the pleasure of the authority making the appointment."

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existing rights of the disputants, official and individual, as established by the various statutes passed by the legislature in restraint of the power of removal. In all interpretation there is room for difference of views, and in the choice of interpretation there is, accordingly, an element of discretion. In the exercise of their discretion, the courts may indicate a policy. In so far as they sustain removals of doubtful legality, they endorse the demand for strong administration; in so far as they reinstate officers when grievances and claims are disputable, they favor decentralization of administration. In order to determine what has been and now is the official attitude of our higher courts in this matter, it will be necessary to consult the decisions.

We must first ascertain, however, what is the proper remedy for obtaining judicial action, *i.e.*, for reviewing administrative determinations to remove, when under some of the many statutory restrictions the determinations are alleged to have been illegal, and for securing reinstatement where a wrong is alleged to have been done. The question is of importance, because, as will be shown below, the review of the act complained is of much more searching in the case, for example, of the writ of *certiorari* than in the case of the writ of *mandamus*. Where no remedy is fixed by the legislature the courts themselves determine what is the proper remedy; and according as we find them favoring the one or the other of the above named remedies, we gain an indication of their policy. In favoring *certiorari* they practically endorse legislative control and administrative decentralization; in favoring *mandamus* they increase the independence and power of the superior administrative authorities.

It is proposed to consider those cases only in which no new appointment has been made, thereby confining the inquiry to the applicability of the writs of *certiorari* and *mandamus*.[1] Further, the examination will be limited to cases that have arisen in the state of New York; partly because, as is shown by the array of text-book authorities favoring the use of the writ of *mandamus*,[2]

[1] These writs do not lie to determine contests over office. For such contests *quo warranto* is the proper remedy. People *ex rel.* Cowles *v.* Ferguson, 20 New York Weekly Digest, 276.

[2] See *infra*, p. 83, note 2.

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there seems to be little if any conflict as to remedy in other jurisdictions,[1] but principally because of the recent attempt on the part of the New York court of appeals to limit the use of the writ of *certiorari* to the review of judicial proceedings.[2] But before proceeding to a study of the cases it will be of advantage to examine the nature of executive action and to classify its various forms.

It is believed that all executive action can be classed under five heads: (1) the act may be obligatory or mandatory, leaving no room for discretion; (2) the performance of the act may be mandatory but discretion may be exercised as to the manner of its performance; (3) the act may admit of the exercise of judgment and discretion as well in determining to act as in the manner of taking action; (4) the performance of the act may be (*a*) mandatory or (*b*) optional, and while discretion may be exercised in taking action, yet in either case the procedure to be followed is fixed by the statute; (5) the exercise of the power may be optional, but in arriving at a determination the statute may require a full judicial procedure. Acts of the first class are purely ministerial; the rest are administrative determinations. In cases falling under class 4 the determination is quasi-judicial, and in those falling under class 5 it is completely judicial.

[1] But see Merrick *v.* Township Board of Arbela, 41 Mich. 630.

[2] The leading New York case cited as holding that *certiorari* does not lie to review other than judicial proceedings is that of People *ex rel.* Copcutt *v.* The Board of Health of Yonkers, 140 N. Y. 1 (1893). In this case, although a hearing was given to the relator and assistance of counsel was allowed him, the court denied the right to review by writ of *certiorari* a determination by the board of health that certain dams, in which Copcutt was interested as owner, constituted a nuisance; because, as Earl, J., said in his opinion, the acts governing the case made "no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance on his premises," and "the board is not authorized by law to hear testimony or take oral examination of witnesses."

In other states the common law *certiorari* has wider application. For New Jersey, see Treasurer *v.* Mulford, 26 N. J. L. 49, 2 Dutcher 49, which refers to various non-judicial actions as reviewable on *certiorari;* Oliver *v.* Jersey City, 63 N. J. L. 634, where it is declared that a municipal ordinance (legislative determination) may be set aside by review upon *certiorari.* For Tennessee, see Mayor and Aldermen *v.* Pearl, 11 Hump. Tenn. 249; and Fields *v.* State, 1 Mart. & Y. Tenn. 168. In Massachusetts, the writ probably lies to review legislative proceedings; see Davis *v.* County Commissioners, 153 Mass. 218, 226. In Wisconsin the quasi-judicial determination of the state superintendent of public instruction has been reviewed in *certiorari* proceedings; see State *v.* Whitford, 54 Wis. 150. *Cf.* also Goodnow in POLITICAL SCIENCE QUARTERLY, vol. vi, pp. 510–513.

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Whatever of the judicial nature the administrative act of removal may have is due to statutory provisions. At common law such a determination by an administrative authority was in no case regarded as judicial or even quasi-judicial. It is the statutory regulation of procedure which has modified the character of the act of removal; and it is the mode of procedure required by the statutes which furnishes the test whether the act is judicial or quasi-judicial in character.

While *certiorari* was originally used to review administrative proceedings definitely regulated by law, the courts constantly asserted that a finding of a quasi-judicial character might be reviewed by this writ. At present there is an attempt to deny the writ in all such cases. The court of appeals insists that *certiorari* shall be employed for the review of such proceedings only as are judicial in character. It has also uniformly favored *certiorari* to review determinations of removal in the police department. It has therefore recognized as judicial an administrative determination authorized by law and based upon a "reasonable notice," "written charges" and a "public examination" or hearing.[1] Statutory proceedings which are less precisely defined than are those requisite to the removal of a policeman may therefore be spoken of as quasi-judicial. Obviously neither *certiorari* nor *mandamus* will lie to review removals where the determination is of optional origin and discretionary nature, because a court will not substitute its own discretion for that of an administrative authority. It is with removals of a quasi-judicial nature, then, that courts have found difficulty in deciding what is the appropriate remedy.

With the passage of the laws of 1873 the first extended control of removals from office was attempted, and particularly is this

[1] Paragraph 300, laws of 1901, ch. 466, amended Greater New York charter reads: "No member . . . of the police force except as otherwise provided in this chapter shall be . . . removed . . . or dismissed . . . until written charges shall have been made or preferred against him . . . nor until such charges have been examined, heard and investigated before the police commissioner or one of his deputies upon . . . reasonable notice to the member . . . charged." Substantially the same provision is found in paragraph 302 of the Greater New York charter, laws of 1897, ch. 378; in paragraph 7 of the 1884 amendment of the consolidation act, laws of 1884, ch. 180; in paragraph 41 of the New York city charter of 1873, laws of 1873, ch. 335; and in paragraph 4, art. 2, laws of 1846, ch. 302.

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true of the New York city charter of that date. Section 25 of the charter provided that the mayor might, in certain cases, remove "for cause and after opportunity to be heard," subject to the governor's approval. The mayor's determination to remove under the statute was reviewed on *certiorari*.[1] But the leading *certiorari* cases grew out of the limitations on the power of the heads of departments in the city goverment to remove. The charter of 1873 declared that

> no regular clerk or head of a bureau shall be removed until he has been informed of the cause of his proposed removal and has been allowed an opportunity of making an explanation; and in every case of removal the true grounds thereof shall be forthwith entered upon the records of the department [or board]. In case of a removal . . . the reasons therefor shall be filed in the department.

In the consolidation act of 1882 the above provision was retained. Under both acts the writ of *certiorari* was used to review the determination to remove and as a means of affording reinstatement when the dismissal was regarded as unjust. In People *ex rel.* Munday *v.* Board of Fire Commissioners[2] a determination to remove was quashed on the ground that the statutory provisions limiting the power of removal were substantial and not to be disregarded. In People *ex rel.* Sims *v.* Board of Fire Commissioners[3] a summary[4] removal was sustained, because the return stated that the relator "was not a regular clerk or head of a bureau," and the court acted upon the rule that the return to the writ must be taken as if conclusive and acted upon as if true.[5] In People *ex rel.* Campbell *v.* Campbell[6] a removal under the statute was quashed on *certiorari* because there was no evidence upon which the determination could be based. In accord with this decision was that made in the important case of People *ex rel.*

[1] People *ex rel.* Mayor *v.* Nichols, 79 N. Y. 582.

[2] 72 N. Y. 445 (Feb., 1878).

[3] 73 N. Y. 437 (March, 1878).

[4] The removal was made without observing the formality of allowing an explanation after communication of the cause of the proposed removal.

[5] Since the adoption of paragraph 2140 of the code of civil procedure this rule is no longer law.

[6] 82 N. Y. 247 (Sept., 1880).

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Keech *v.* Thompson,[1] where the court found that there was some evidence of the charges and so sustained the removal. In the case of People *ex rel.* Dean *v.* Brookfield [2] a summary removal was made which resulted in a reinstatement on *certiorari*. In People *ex rel.* Mitchell *v.* La Grange [3] a removal made under the statute, as in the Campbell case, resulted in the reinstatement of the relator on *certiorari*. Some of the reasons assigned for the removal were not substantial, some were within the knowledge of the removing authority alone. The appellate division rested its decision upon the ground that the accused was really denied the opportunity to explain. The case was promptly appealed and was unanimously affirmed by the court of appeals,[4] solely on the opinion below. A close case was that of People *ex rel.* Mason *v.* Cruger,[5] in which a removal was upheld as "the charges . . . were not frivolous" and "it was for them [the commissioners] to say whether [the] explanations [given] were sufficient in view of what they knew." O'Brien, J., rendered a vigorous dissenting opinion, but the case was never appealed.

Until the Greater New York charter [6] went into effect on January 1, 1898, the courts of the state had thus almost uniformly [7] entertained *certiorari* proceedings for reviewing alleged illegal removals. The new charter, as amended in 1901, gave the mayor unrestricted power to remove his own appointees,[8] but the previously existing statutory restraints were retained respecting the removal of policemen,[9] of firemen [10] and of regular clerks and heads of bureaus [11] in the various departments of the city government.[12]

In the meantime the legislature had passed a new civil service

[1] 94 N. Y. 451 (Jan., 1884).

[2] 1 App. Div. 68 (Jan. 1896). Notice of dismissal only was given. There was here no determination by authority of the statute and therefore nothing to review. The act was but an illegal administrative determination of optional origin and discretionary nature.

[3] 2 App. Div. 444 (1896).

[4] 151 N. Y. 664 (Feb., 1897).

[5] 17 App. Div. 483 (May, 1897).

[6] Laws of 1897, vol. iii, ch. 378.

[7] With the exception of cases arising out of the discharge of veterans; *cf.* pp. 80–82.

[8] Subject to the provisions of the Greater New York charter in sec. 95.

[9] *Ibid.*, sec. 300.

[10] *Ibid.*, sec. 739.

[11] *Ibid.*, sec. 1543.

[12] Enumerated *ibid.*, sec. 96.

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law, known as the Brush law, which purported to amend the law of 1883. It was provided in the new civil service law that

> if a person holding a position subject to competitive examination in the civil service of the state or of a city shall be removed or reduced, the reasons therefor shall be stated in writing and filed with the head of the department or other appointing officer, and the person so removed or reduced shall have an opportunity to make an explanation.[1]

The similarity of this restriction on the power of removal to that provided in the charters of 1873, 1882, and 1897 governing the dismissal of "regular clerks" and "heads of bureaus" is striking. Under the Brush civil service law the person to be removed "shall have an opportunity to make an explanation"; under the charters he must have been "informed of the cause . . . and allowed an opportunity of making an explanation." Substantially the only difference in wording lay in the omission from the Brush law of the words "informed of the cause"; and it is difficult to see that such omission was material, for in order to "have an opportunity to make an explanation" it would seem that the person to be removed must first have been "informed of the cause."

A number of removals[2] were soon made, and this statutory restriction was brought before the courts for their interpretation. These first cases, so far as the writer has discovered, all arose out of summary removals, *i.e.* removals without the hearing provided by law, and all were proceedings for writs of *mandamus* to compel reinstatement. In some, reinstatement was made on the ground that the persons removed were entitled to the protection afforded by the statute[3] and could not be removed except after "an opportunity to make an explanation"; but in no one of these or other *mandamus* proceedings which have been examined did the courts, including the court of appeals, or counsel as reported

[1] Laws of 1898, ch. 186, sec. 3.

[2] People *ex rel.* Leet *v.* Keller, 31 App. Div. 248; affirmed 157 N. Y. 90 (Oct., 1898). People *ex rel.* Terry *v.* Keller, 35 App. Div. 493; affirmed 158 N. Y. 187 (Feb., 1899).

[3] People *ex rel.* Fleming *v.* Dalton, 34 App. Div. 627; reversed 158 N. Y. 175 (Feb., 1899). People *ex rel.* Bailie *v.* Scannell, 36 App. Div. 629; reversed 158 N. Y. 686 (Feb., 1899).

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in the books, give any attention to the question as to what was the proper remedy.

But one case has been found which arose under the Brush civil service law and in which a removal made after "explanation" had been heard was reviewed on *certiorari* proceedings. This is the case of People *ex rel.* Lawson *v.* Coler.[1] In this case a dismissal was sustained on the ground that "the act of removal is clearly beyond judicial control when, as here, the reason assigned for it is a good one and the explanation offered shows that it has a sufficient foundation in fact."

The law under which these numerous cases arose was repealed by the civil service law of 1899,[2] and the provision that persons holding positions subject to competitive examination "shall have an opportunity to make an explanation" was not reënacted. State civil service rule 42, indeed, contained a similar limitation, but in a case in the appellate division which does not seem to have been appealed, this rule was declared null and void, so far as it affected other than regular clerks and heads of bureaus,[3] on the ground that it constituted a substantial limitation upon the power of removal conferred upon the heads of departments by section 1543 of the New York city charter of 1897. This case was a *mandamus* proceeding; and it is to be remarked that there was an entire disregard of statutory formalities: no notice to appear was given, no explanation was made, nor were any charges preferred.

A similar dismissal gave rise to the case of People *ex rel.* Gleason *v.* Scannell.[4] Gleason was a fireman holding his position as a result of a competitive examination.[5] He was removed in March, 1898, without charges or hearing or any notice except notice of dismissal.[6] On *mandamus* proceedings he was reinstated because "improperly removed."

[1] 40 App. Div. 65; affirmed on opinion below in 159 N. Y. 569 (June, 1899).

[2] Laws of 1899, ch. 370.

[3] People *ex rel.* Brennan *v.* Scannell, 62 App. Div. 249. See also People *ex rel.* Pettit *v.* Kane, 70 N. Y. Supp. 982.

[4] 172 N. Y. 316, (November, 1902).

[5] See section 124 of Greater New York charter, laws of 1897.

[6] Sec. 739 of the charter provides that "members of the uniformed force shall be removable only after written charges shall have been preferred against them, and after the charges shall have been publicly examined into, . . . upon reasonable notice to the person charged." These provisions require a judicial determination.

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It was not until July, 1900, that the appellate division, and not until February, 1901, that the court of appeals went on record expressly as to the applicability of *certiorari* for reviewing a removal under the statutory restrictions imposed by the Brush law and reënacted in the civil service law of 1899. Opportunity for determining the question was afforded in the case of the People *ex rel.* Kennedy *v.* Brady.[1] The relator who was a messenger in the department of buildings in New York city and whose position was classified as competitive, was removed after he had been permitted to give an explanation in accordance with the formalities required by statute. Briefly, the facts were that Kennedy had been directed to deliver a notice personally to one Burlingame who lived in the borough of Bronx. After three unsuccessful but meritorious attempts to serve the notice, and in the face of conditions which appeared to make further efforts useless, he desisted, promptly reporting his failure. It was asserted that the rather general directions under which he was acting required a fourth trip; and for not making this, together with other causes apparently none too well-founded or consequential, he was removed.[2] Dissatisfied with this treatment, Kennedy secured a writ of *certiorari* for reviewing the proceedings, not for irregularity, but on the grounds that a just discretion had not been exercised in his removal, that the charges were not substantial but frivolous, and that his explanations had not been received and acted upon with fairness but arbitrarily. In annulling the determination of the commissioner and restoring the relator to office, the appellate division, through Judge Hatch, cited with approval the Mitchell case,[3] which had been unanimously affirmed by the court of appeals upon the opinion of the appellate division, and in which it had been decided that the person removed was entitled to be informed of the cause in order that he might have an opportunity to explain. The respondent commissioner appealed, and the court of appeals reversed the decision, sustained the dismissal and denied the right to review the proceedings by writ of *certiorari.* The court said that the "action . . . of removing the relator was

[1] 166 N. Y. 44.

[2] See 53 App. Div. 279, where the facts are fully and clearly stated.

[3] People *ex rel.* Mitchell *v.* LaGrange, 2 App. Div. 444, cited *supra*, p. 74.

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not a judicial proceeding in any legal sense . . . and the writ of *certiorari* does not lie to review it." The statute does not provide for such a review, and since at "common law" "the writ could be issued only for the purpose of reviewing some judicial act," its use in such a case as that under consideration is not authorized by the code of civil procedure (section 2120). In further justification of its decision, the court said that the head of a department

> may exercise the power of removal upon facts within his own knowledge and based upon information received from others. The reasons assigned for the removal must appear fair upon their face to justify the action; in other words, they must be substantial; but when they appear to be sufficient to justify the determination the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the department. In other words, the sufficiency of the relator's explanation was a question for the commissioner alone to determine and the courts have no power to interfere with his discretion in that regard.

The Munday, Sims, and Keech cases[1] are cited as authority for the decision. It is submitted, however, that the court took from the opinions in these cases statements not necessary to the decisions rendered. In the Munday case the relator was restored because the removal proceedings of the board were irregular and therefore illegal. The question of the sufficiency of either charges or explanation had no place in the law of the case, for no charges were made nor was any explanation given. In the Sims case the relators, being mere ministerial officers, were removable at pleasure. All that this case stood for was that the facts shown by the return were conclusive, and this rule no longer holds since the adoption of section 2140 of the code of civil procedure. Nor did the Keech case stand for the bare proposition laid down in the case now under consideration. What that case really decided was that when there is some evidence, *i.e.* when any of the charges is sufficient as matter of law for removal, the sufficiency of the ex-

[1] People *ex rel.* Munday *v.* Board of Fire Commissioners, 72 N. Y. 445; People *ex rel.* Sims *v.* Board of Fire Commissioners, 73 N. Y. 437; People *ex rel.* Keech *v.* Thompson, 94 N. Y. 45. These cases (cited *supra*, p. 73) are *certiorari* cases which arose under the charter of 1873.

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planation is a question for the removing authority alone. And in the Mitchell case it seems clear that the court of appeals made the sufficiency of explanation a matter of law.

The statement by Judge O'Brien in the case now under consideration, to the effect that "it would seem to be quite clear . . . that the writ of *certiorari* does not lie [at common law] to review . . . except possibly in cases where he [the removing authority] has not complied with the law in filing written reasons and affording an opportunity for explanation," is made without citing authorities, and it does not appear whether the learned judge meant mere irregularity of proceedings or entire disregard of statutory formalities. If the former is meant, the extensive use made of the writ would justify the remark; if the latter, the exception expressed may not be justified, as will appear subsequently.

From this decision Bartlett, J., dissented. He said that "the accused was entitled to know not only what the charges are, but his explanation must be received and acted upon in good faith and not arbitrarily," thus approving of the Mitchell case.

A recent and interesting case is that of People *ex rel.* Holden *v.* Woodbury,[1] a proceeding for *mandamus* to reinstate a member of the uniformed force who was removed on a charge of insubordination. At the time of his dismissal Holden was on trial for other charges. The person who had preferred the charges admitted during the hearing that the relator was not guilty. Holden asked that this person be sworn, and; being denied this, said: "I demand that the man be sworn to tell the truth"; whereupon the deputy commissioner, then conducting the explanation proceedings, retorted: "I believe him, . . . damn you!" The relator responded: "In Dr. Wallace's office there is a sign, there by order of the commissioner, that a gentleman never uses profanity, and the second paragraph reads: 'Are you a gentleman?' . . . with a big question mark after it." Later the commissioner took charge of the case and the deputy preferred charges of insubordination. The relator, being asked what he had to say to such charges, refused to explain and protested against any present proceeding upon the ground of not having due notice of the new charge and time to prepare a defence.

[1] 88 App. Div. 593 (Dec., 1903).

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Section 537 of the revised charter of Greater New York,[1] which bears on this case, provides that "in the event of the removal of any member of the . . . uniformed force [in the department of street cleaning] he shall have the right to sue out a writ of *certiorari* or other appropriate remedy for the purpose of reviewing the act of the commissioner or his deputy." The section also provides that the accused must be "informed of the cause . . . and allowed an opportunity of making an explanation, and in every case of removal the true grounds thereof shall be entered upon the records of the department." The relator secured a writ of *mandamus*, but on appeal the order granting the writ was reversed and the determination of the commissioner was sustained on two grounds: (1) that the statutory requirements having been complied with, the commissioner had a right to remove at his discretion; and (2) that *mandamus* was not an appropriate remedy. Upon the matter of remedy, the court said:

> A *mandamus* is to command action and not to review proceedings. It cannot be used for the correction of errors. . . . By the words "appropriate remedy" used in the statute is meant some remedy by which the proceeding . . . can be brought before the court for review, and not a proceeding which commands the [doing of] . . . one thing or another.

Under the insanity law of 1896,[2] which limited the power to remove to cases "for cause stated in writing after opportunity to be heard," it was held that *mandamus* would not lie to restore, the removal being made because no funds were provided for the position.[3]

In 1894 the legislature limited the power of removal as regards veterans[4] to cases of "incompetency and conduct inconsistent

[1] Laws of 1901, ch. 466, sec. 537.

[2] Laws of 1896, chapter 545, sec. 35, § 2.

[3] Matter of Porter *v.* Howland, 24 Misc. 434 (1898).

[4] The early statutes attempted only to give a preference in appointment and employment to veterans. The first case of removal considered is that of Matter of Sullivan, 55 Hun, 285. The relator was an honorably discharged soldier and, after appointment in obedience to the preference given to veterans by chapter 464 of the laws of 1887, was dismissed without any good reason. On *mandamus* proceedings he was reinstated, and of the statutory requirement the court said: "This

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with the position." It further provided that a veteran "wrongfully removed . . . shall have a right of action . . . for damages . . . in addition to the existing right of *mandamus*." In People *ex rel.* Fonda *v.* Morton [1] the court, despite the recognition in the statute of *mandamus* as an existing remedy, yet held that the legislature, by making the appointees irremovable except for incompetency and conduct inconsistent with the position, left it to the removing power to determine whether the facts existed which authorized a removal. The removing power, the court added, would be subject to responsibility for wilful or perverse action. The return in this case stated that the discharge had been made "for incompetency and conduct inconsistent with the position," and as, in the language of the court, "nothing appeared upon the record to show that the power was not exercised in good faith and in the public interest," the motion for the *mandamus* was denied.

The only *certiorari* case under the veteran acts that has been discovered by the writer is that of People *ex rel.* Fallon *v.* Wright.[2] As a veteran Fallon could not "be removed . . . except for cause

amounts practically to a statutory command, directed to the heads of departments, requiring the performance of a particular duty in a particular manner, and it brings the case within one of the principles peculiarly applicable to *mandamus*. The duty is a public one and individuals who have no clear legal right to its performance are without adequate remedy at law to secure such performance or to enforce their rights.

In the amendment of 1898 (laws of 1898, ch. 184) it was provided that veterans could be removed only "for cause after hearing had." These are almost the exact words of the charter restriction on removals by the mayor, as provided in the laws of 1873, under which removals were reviewed by writ of *certiorari*. But no removals seem to have arisen subsequent to the amendment of 1898 except those of a summary or informal nature, and accordingly only *mandamus* cases have resulted. The leading case is that of Matter of Breckenridge, 160 N. Y. 103 (Oct., 1899), in which the removal, though in entire disregard of the statute, was justified on the ground of economy. The statute provided that if any position held by a veteran should become unnecessary, or should be abolished for reasons of economy, "he shall not be discharged from the public service, but shall be transferred to any branch of the said service for duty in such position as he may be fitted to fill, receiving the same compensation therefor." It seems to make no difference what the statutory regulation governing the power to remove may be so long as such removal is for purposes of economy.

[1] 148 N. Y. 156 (Jan., 1896).

[2] 150 N. Y. 444 (1896) affirming 7 App. Div. 185. In the latter report the opinion by Barrett, J., contains at pages 187 and 188 a good statement of the privileges given by all of the veteran acts up to and including the laws of 1894, ch. 716.

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shown after a hearing had." [1] Upon a determination arrived at in obedience to statutory procedure the relator was removed, but the court upon review by *certiorari* restored him and quashed the determination to remove, both upon the facts and the law.

We have seen that removals "for cause after opportunity to be heard" [2] and "for cause shown after hearing had" [3] have been reviewed by writ of *certiorari*, but that cases arising under the statutes requiring removals to be "for cause stated in writing after opportunity to be heard" [4] and "for cause after hearing had" [5] have been reviewed in *mandamus* proceedings; that where the limitation reads that the accused can be removed only after having been "informed of the cause . . . and allowed . . . an opportunity of making an explanation" [6] *certiorari* proceedings have been uniformly entertained, but that where the law provides that dismissal may be made "after opportunity to make an explanation" [7] the action can be reviewed only by writ of *mandamus* [8]; that *mandamus* has been resorted to for reinstating one removed without cause where the statute gives a right to preferential "appointment and employment," [9] but denied when the legislature has limited the right to remove to cases of "incompetency or misconduct" although the law recognizes the existing right of *mandamus*" [10]; that where the statute provided for "review by writ of *certiorari* or other appropriate remedy" and specified that the removed must first be "informed of the cause . . . and allowed . . . an explanation" [11] *mandamus* has been held not to be an appropriate remedy; and finally that *mandamus* proceedings have been

[1] Laws of 1892, ch. 577.

[2] People *ex rel.* Mayor *v.* Nichols, 79 N. Y. 582.

[3] People *ex rel.* Fallon *v.* Wright, 150 N. Y. 444.

[4] Matter of Porter *v.* Howland, 24 Misc. 434.

[5] Matter of Breckenridge, 160 N. Y. 103.

[6] See cases cited *supra*, p. 73.

[7] People *ex rel.* Kennedy *v.* Brady, 166 N. Y. 44. With one exception only: People *ex rel.* Lawson *v.* Coler, 40 App. Div. 65, 159 N. Y. 569, cited *supra*, p. 76.

[8] See cases cited p. 75, notes 2 and 3. See also People *ex rel.* Gleason *v.* Scannell, 172 N. Y. 316.

[9] Matter of Sullivan, 55 Hun, 285.

[10] People *ex rel.* Fonda *v.* Morton, 148 N. Y. 156. In this case however the court sufficiently reviewed the determination to satisfy itself that said determinative action was not "wilful or perverse."

[11] People *ex rel.* Holden *v.* Woodbury, 88 App. Div. 593.

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entertained usually to review removals where no hearing or explanation such as the statute contemplated had been given [1] as well as to ascertain that the dismissal was made for purposes of economy.

What then is the appropriate remedy where the act complained of is something less than judicial and yet something more than a simple executive act, and no specific remedy is provided by law? The overwhelming weight of authority among text-book writers is in favor of *mandamus*,[2] but none of these writers attempts to justify his position; they all merely cite authorities and make no effort to classify administrative action. Perhaps the best brief exposition of the nature of *mandamus* is to be found in People *ex rel.* Harris *v.* Commissioners,[3] where Judge Vann says:

> The primary object of the writ of *mandamus* is to compel action. It neither creates nor confers power to act, but only commands the exercise of powers already existing when it is the duty of the person or body proceeded against to act without its agency. While it may require the performance of a purely ministerial duty in a particular manner, its command is never given to compel the discharge of a duty involving the exercise of judgment or discretion in any specified way, for that would be to substitute the judgment and discretion of the court issuing the writ for that of the person against whom the writ was issued. In such cases the sole function is to set in motion without directing the manner of performance.

And this opinion has been approved by the court of appeals so late as May, 1903.[4]

Inasmuch as the determination to remove, as the exercise of a common law power, is purely executive in nature and, in so far as it has become judicial, owes such quality solely to legislative restrictions, it would seem that upon principle the writ of *certiorari*

[1] See cases cited on p. 76. See also People *ex rel.* Brennan *v.* Scannell, 62 App. Div. 249.

[2] High, Extraordinary Legal Remedies, § 67; Shortt, Mandamus, p. 284; Mechem, Law of Officers, § 980 (but see § 1011); Spelling, Injunction and other Extraordinary Remedies, 2d ed. § 1576; Dillon, Municipal Corporations, 4th ed. § 847; Wood, Mandamus, 3d ed., p. 12; Elliott, Municipal Corporations, p. 319, cit. 6; Cyclopædia of Law and Procedure, vol. vi, p. 758.

[3] 149 N. Y. 26.

[4] People *ex rel.* Sims *v.* Collier, 175 N. Y. 196.

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is the appropriate remedy to review removal proceedings. So long as the act complained of violates the statutory process requisite to a valid removal, the writ may lie though proceedings to remove may include no more than bare notice to appear and explain or a simple appearance in answer to such a notice. But when the formalities required by law are entirely disregarded, as where one dismissed gets bare notice of removal or where the proceedings are not within the contemplation of the statute, the determination cannot be said to be affected by the statute and consequently such an act cannot be quasi-judicial; it is rather an illegal exercise of an executive power; and whether we regard the duty not to remove, except in conformity with the proceedings outlined in the statute, as purely ministerial, and the right to office or position in such case as a clear legal right, or do not so regard them, it still seems that the objections to the use of *certiorari* in this instance are founded in good reason. In short, there is in such a case no procedural determination to review and to quash or sustain, and such is the very nature and purpose of the writ.

The distinction here insisted upon is a close one, but it is submitted that it is a valid one, and that it will go far to reconcile the apparently contradictory uses of the writs of *certiorari* and *mandamus* as a means of reviewing alleged illegal removals.

However, the present position of the court of appeals is clearly to the effect that a removal made after "opportunity to make an explanation" is not reviewable by writ of *certiorari*. Whatever of doubt as to its attitude on the question may have remained after its decision in the Kennedy case,[1] has been entirely removed by the late case of People *ex rel.* Ryan *v.* Wells,[2] decided in November, 1903. In this case the relator was removed after having an opportunity to explain, which was all that the statute required[3]; and on bringing *certiorari* to review the determination he was denied the benefit of the writ, on the ground that, since he "was

[1] People *ex rel.* Kennedy *v.* Brady, 166 N. Y. 44, cited *supra*, p. 77.

[2] 176 N. Y. 462.

[3] Laws of 1897, ch. 466, as amended in 1901, being section 1543 of the Greater New York charter: "No regular clerk or head of a bureau or person holding a position in the classified municipal civil service subject to a competitive examination shall be removed until he has been allowed an opportunity of making an explanation."

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not entitled to a hearing on charges, *certiorari* to review his removal would not lie."

Under present decisions then *certiorari* will not lie to review a determination to remove where the statute simply requires that "an opportunity to make an explanation" be given. This rule, it is believed, is founded on the effort made by the court of appeals to limit the use of *certiorari* to the review of merely judicial proceedings. But neither as to the remedy nor as to the character of the determination has the line thus far been drawn with precision. Formerly, when the statute required that the accused be "informed of the cause of the proposed removal" as well as given "an opportunity of making an explanation," *certiorari* was uniformly regarded as the proper remedy,[1] and the law of the earlier cases has never been explicitly overruled, although recent decisions would seem to indicate a very material limitation. In fact, so material has been the narrowing of the former rule that now the law is said to be that *certiorari* is the proper remedy only as regards removals for cause.[2] This it is maintained, cannot be justified on principle nor by the authorities. What is cause for removal may well be a question of law[3]; but a proceeding to determine what is cause is no more a judicial proceeding than one to determine what is a nuisance. This latter question is undoubtedly a question of law in New York,[4] yet *certiorari* is said not to be the proper remedy to review its determination. The main distinction between the two classes of cases lies in the fact that in the removal cases the legislature has established a procedural prerequisite to the validity of the determination to remove. In such cases the accused is entitled to make an explanation as matter of legal right. It is true that the statute authorized a limited pro-

[1] See causes cited under charter of 1873, p. 73.

[2] Abbott, New York Cyclopædia Digest, vol. iii. p. 95, so words the rule: "the writ [of *certiorari*] will lie to review proceedings of executive officers or boards in removing subordinates for cause."

[3] And may come up on *mandamus*, as in State *ex rel.* Gill *v.* Common Council, 9 Wisc. 254. See also People *ex rel.* Fonda *v.* Morton, 148 N. Y. 156, where the question of what constituted "incompetency and misconduct" came up on *mandamus*.

[4] See People *ex rel.* Copcutt *v.* Board, 140 N. Y. 1, where it is said that the question of what is a nuisance may be settled in an action in equity to restrain the destruction of the property or in an action in law for damages after it has been destroyed.

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cedure in nuisance cases, but it did not make the person whose interests were at stake a party to the proceedings at which the determination was made.[1] This comparison reveals then another essential of a quasi-judicial determination which may be reviewed by *certiorari*, *i.e.* that the person whose interests are at stake must by statutory provision be a party to the proceedings at which the determination sought to be reviewed is reached.

When, however, the statute provides that the accused shall be "allowed an explanation" the determination to remove is said not to be judicial enough to be reviewed by *certiorari*. But when in addition to being "allowed an explanation" the accused is to be "informed of the cause," *certiorari* will issue to review the determination to remove. In other words, the added statutory provision changes a simple executive determination into a quasi-judicial one. The omission of the provision that the accused shall "be informed of the cause," when he still has the right to make an explanation, does not deprive him in any way of his right to be a party to the proceedings for removal, for if he is removed without opportunity to explain he may be reinstated on *mandamus*, yet in such case he cannot have *certiorari* to review the proceedings precedent to the determination to remove.

It seems wrong on principle to deny the writ of *certiorari* because the statute omits to specify that the accused "shall be informed of the cause" when it guarantees him the right to make "an explanation"; and it appears clear that unless *certiorari* lies to review all cases where an opportunity to explain is guaranteed, reasons which have "no existence as matter of fact" may be advanced to cover removals which are really arbitrary and capricious, destructive of the individual's right and subversive of the interest of the public as well. That where the statute requires only an "explanation" *certiorari* should lie to review removals, in order to determine whether in fact a real opportunity to explain has been given, and whether "in every case of a removal . . . the grounds thereof . . . entered upon the records of the department" are true as required by law, seems but a fair and reasonable interpretation of the statute as viewed in the light of decisions arising under similar statutory provisions.

[1] Laws of 1885, ch. 270.

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Adopting the view that whatever of judicial nature the determination to remove may have is due to the procedure required by statute, we must logically reach the following conclusions:

When the official action is without color of authority it is void and of no effect and no remedy is required for reinstatement.[1] When the law merely requires that removal be made "for cause" or for "incompetence or misconduct," and in cases of summary removal, *i.e.* removal in utter disregard of statutory formalities, the proper remedy for bringing before a court the determination complained of and for securing reinstatement is *mandamus*. When the statute requires that an "explanation" be given before dismissal, whether other limitations are or are not imposed upon the power to remove, the determination is quasi-judicial and if illegal it should be reviewed and quashed by judicial authority on *certiorari*. (This is not, however, in all cases the rule of the courts.) When a "hearing" is required, the determination, though made by an administrative authority, is nevertheless judicial in character and is reviewable by writ of *certiorari*.

It was suggested in the first part of this paper (p. 70) that the determination of the proper remedy in removal cases would be of assistance in ascertaining what has been and is the official attitude of our higher courts toward a strongly centralized administration, at least in the police department. Long before the legislature undertook to regulate removals in any extended sense, the courts gave to policemen who were removed a right to have the determination against them reviewed; and if it appeared that no good cause existed for the removal or that the proceedings were irregular, the officer was reinstated.[2] The writ of *certiorari* lay in such cases, and has continued to be preëminently the policeman's safeguard against arbitrary removals. It is such to-day;[3] and the courts have adopted it in police cases even where the

[1] Tate *v.* Dalton, 158 N. Y. 204.

[2] People *ex rel.* Gambling *v.* Board of Police, 6 Abb. Pr. 162 (1858); People *ex rel.* Grace *v.* Board of Police, 43 How. Pr. N. Y. 385 (1872); People *ex rel.* Shea *v.* Board of Police, 9 Hun, 222 (1876); People *ex rel.* Murphy *v.* French, 60 How. Pr. N. Y. 377 (1881); People *ex rel.* Cross *v.* Green, N. Y. *Law Journal*, Nov. 23, 1904.

[3] People *ex rel.* Cross *v.* Green, *loc. cit.*

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determination is not judicial in character.[1] This practice has obtained without legislative direction as to the remedy applicable, only one instance having been found of specific recognition of a right to review before the courts.[2] It would seem therefore that our higher courts have officially endorsed legislative control, and consequently judicial control, over the acts of the higher police officials. Doubtless they accepted *certiorari* as the appropriate remedy for reviewing removals where the statute required "notice," "charges" and a "hearing," because they regarded the procedure as so nearly like that of a common law court, so nearly judicial, as to be fitly reviewed like the findings of a lower court in a higher. Otherwise, the writ of *mandamus* might have been adopted, as it was where the statute required that simple explanation be allowed, in which event decisions insisting upon the observance of the letter of the law rather than of its spirit would quite as effectively have put the courts on record as opposed to administrative decentralization through legislative control.

Examining the other classes of removal cases, we find that the courts have been less inclined to favor legislative control and that this attitude has tended to increase administrative power. This is clearly revealed in the preference which has of late years been shown for the writ of *mandamus* as the remedy for review and reinstatement. In a *mandamus* proceeding, unless it appears that the removing authority was strikingly in the wrong, that the action was "wilful or perverse," the courts will not interfere even

[1] People *ex rel.* McCune *v.* Board of Police, 19 N. Y. 188.

[2] That is, in the Greater New York charter, as amended by the laws of 1901. Section 302 provides that "no proceeding shall be brought to secure a restoration or reinstatement . . . unless said proceedings shall be instituted within four months after the decision or order sought to be reversed." This statutory recognition of a remedy was made in 1884: laws of 1884, ch. 180, § 7, amending the consolidation act of 1882. It was not, however, until the 1901 amendment to the Greater New York charter was made that the time within which a "proceeding" must be brought in the courts to procure restoration or reinstatement was so fixed as to suggest, even by implication, what writ the legislature intended the courts should entertain as affording an appropriate review and adequate relief. The statute in question fixed the time limit for bringing a proceeding to secure reinstatement at four months. Greater New York charter, § 302, as amended by the laws of 1901, ch. 466. The code of civil procedure, §§ 2120, 2125, also fixed at four months the time in which the writ of *certiorari* might be granted "to review the determination of a body or officer."

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though the reasons given for the act had no existence as matter of fact. On the other hand the *certiorari* review, as developed in the early cases and in the code of civil procedure, requires an examination by the court both of the law and of the evidence in support of the administrative determination, which may be set aside as may the verdict of a jury when it is against the weight of evidence.[1] Thus it is apparent that reviews on *certiorari* tend much more strongly than *mandamus* proceedings to limit administrative power in the matter of removals. In fact it is hardly too much to say that *mandamus* proceedings quite nullify legislative restraint upon the power of removal. It cannot then be questioned that in denying *certiorari* to review quasi-judicial determinations our courts have officially espoused the cause of centralized administration.

Is it not also true that the courts, in thus limiting their own jurisdiction, may have been actuated by a belief in the inexpediency of subjecting the disciplinary power of the higher administrative officers to judicial control? Such a belief would certainly be in accord with the views which are becoming more and more widely adopted as to the necessity of concentrating responsibility for administrative action in municipal government, and which have found expression in the great increase in the powers of the mayor.

Without assuming the existence of any peculiar reasons in favor of a decentralized police authority, the difference in the attitude of the courts towards police removal cases may be explained by the fact that the use of *certiorari* in police removal cases was developed at a time when the *certiorari* review could not result in reversing a determination to remove merely because such determination was regarded by the court as contrary to the weight of evidence. This extension of the province of the writ was made by section 2140 of the code of civil procedure, which was applicable to all determinations reviewable by *certiorari*. Notwithstanding any impropriety in the application of the rule to police removal cases, the rule had to be applied so long as *certiorari* was recognized as the proper remedy; and it could hardly be expected

[1] Code of civil procedure, § 2140; People *ex rel.* Lee *v.* Doolittle, 44 Hun, 293 (1887).

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that the courts would abandon the use of *certiorari* in these cases, based as it was on so long a line of precedents.

Where, however, the courts have considered themselves free to act they have adopted, as has been shown, the policy of not interfering with the disciplinary powers of administrative authorities and have thus arrayed themselves on the side of centralized administration. But in spite of this their attitude towards the general question, their official attitude towards the particular question of police removals, whatever may be the unofficial utterances of certain judges, has been in favor of judicial control of police removals. A recent decision, however, People *ex rel.* Garvey *v.* Partridge,[1] would seem to indicate a possible change in the judicial attitude. In the opinion in this case Judge Werner says:

> The hearing and disposition of charges against members of the force necessarily involve the exercise of discretion and judgment. But these are quasi-judicial functions of an administrative officer rather than the strictly judicial functions of a legal tribunal.

As a result of this consideration the court, without dissent, holds that a removal made by the commissioner on a finding of guilt, not in writing, by the deputy commissioner who heard the charges, may not be reversed on *certiorari*, and reverses the order of the appellate division which reinstated the policeman so removed.

If the court in the future gives much development to this idea, a change in the law may result from its action. If however this recent decision is merely one of the attempts which the court in the past has sometimes made to do justice in the particular case without regard to its previous decisions, any change in the existing law must of necessity be made by the legislature. To outline what such change should be, if any change indeed should be made, is not the purpose of this paper, which has been written with the idea of indicating what is the law in regard to removals in general and police removals in particular and of ascertaining the reason why different rules of law have been adopted in the two classes of cases.

CLAY LAWRENCE.

NEW YORK CITY.

[1] Jan. 17, 1905, reported in *New York Law Journal* of Tuesday, Jan. 24, 1905.

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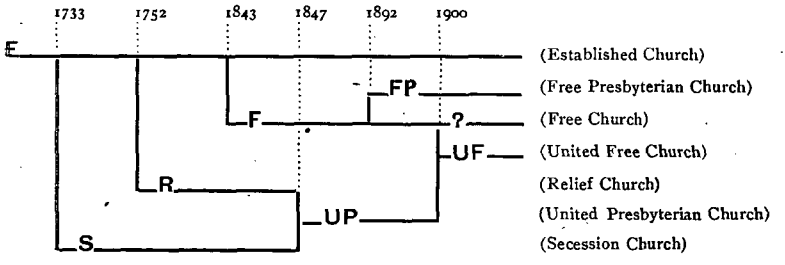
THE SCOTTISH CHURCH CASE

AND THE QUESTION OF CHURCH IDENTITY

THE Scottish church case, which for the time has dwarfed all other political issues in Scotland, arose out of the union in 1900 of two of the three great Presbyterian churches, *viz.*, the Free Church, which was constituted after the Disruption of 1843, and the United Presbyterian Church, which was itself the result of the union in 1847 of the Secession (1733) and the Relief (1752) churches.[1] The Union of 1900 was received with almost universal approval and seemed to remove some of the reproach which had long lain at the door of Scottish Presbyterianism of unjustifiable schism and separation. To say that every disruption and secession in Scottish ecclesiastical history has taken place on political grounds, or at least on grounds of church government, would not be strictly accurate, for there has also been on every such occasion a distinction if not of theological form yet of theological spirit, and the Seceders of 1733 as well as the Free Church Disruptionists of 1843 were evangelicals as contrasted with the dominant "moderates"; but between the three great Presbyterian churches as they existed prior to 1900 — the Established Church of Scotland, the Free Church of Scotland and the United Presbyterian Church of Scotland — the only cause of division evident to the

[1] The principal divisions and reunions of Scottish Presbyterianism to which the author alludes in this article may be represented graphically as follows:



The question-mark under 1900 indicates that the continued existence of the Free Church outside of the Union was the point in dispute. — EDS.

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outsider was the fact or the principle of establishment. With regard to this fact or principle the Established Church and the United Presbyterian Church represented the two extremes. The latter was purely voluntary in character; but it did not make the fact or principle of voluntaryism a condition of membership or of ordination, nor did the Established Church on its part make the fact or principle of establishment such a condition. The Free Church occupied a middle position. It believed in a theoretical establishment and practised an essential voluntaryism. It had committed itself in the past to the principle of establishment as the Church of Scotland itself had never done; but after half a century of self-support it developed much more practical sympathy with the voluntaryism of the United Presbyterians, and like the latter body it passed resolutions of a semi-political character calling for disestablishment and disendowment. Like the others it had never made the principle of establishment a condition either of membership or of ordination.

With regard to doctrinal position all three churches were in practically the same position. Substantially they all held by the Confession of Faith. The United Presbyterians had indeed led the way in passing a declaratory act, not amending the Confession, but explaining that certain logical extremes and alternatives need not be held as the only interpretation of that instrument. In particular this declaratory act asserted, as was natural in what was preëminently a missionary church, that nothing in the Confession should be held to bar the preaching of a "free gospel." Later, in 1892, the Free Church followed the example with a permissive declaratory act, leaving those who preferred the ancient form free to accept the Confession in an unqualified sense. The Established Church has not in any way amended or qualified the Confession, not because its members have not desired the relief but because of doubts as to the competence of the Assembly to alter even its subordinate standards without permission of Parliament. The United Presbyterian declaratory act was passed unanimously. The Free Church act provoked a secession — the Free Presbyterian Church — and left a body of malcontents within the Free Church itself. It must not however be supposed that the United Presbyterian Church was less orthodox than the Free Church. It

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was only more homogeneous. The Free Church had doctrinal parties, and its advanced and dominant section was largely identified with the "higher criticism." It is one of the ironies of the present situation that the Union, which heavily reinforced the orthodox party in the Free Church by the addition of the great moderate body of United Presbyterians, was the occasion of the revolt and defection of the old guard of orthodoxy in the Free Church. The question of the higher criticism did not rise before the law courts but it has been a prominent factor in the situation. A certain publication called a Polychrome Bible has appealed wildly to the terrified imagination of the Celtic adherents of the Free Church. With the higher criticism the United Presbyterians had little to do, and the declaratory acts of the two churches were separate and independent acts. The difference between the two churches was confined to the theoretical position which the Free Church had taken up regarding a possible establishment; and even that difference disappeared if reference were made to the original documents of the United Presbyterians, for the "Judicial Testimony" of the Seceders (1739), which has never been repudiated, adheres to the Covenants.

The Union consummated in 1900 was hailed as a great step towards unity and met with almost universal approval. It had been long in contemplation, and in each of the two churches it was carried through in proper form according to the constitution of a Presbyterian church. It has been claimed that on a matter of such importance the congregations should have been consulted directly by a kind of plebiscite; but a plebiscite, though natural enough in Congregationalism, is as revolutionary in a Presbyterian church as it is in a representative democracy, and as a proposal it was little more than the obstructive protest of a defeated minority. In any case the Union was the consummation of a long movement and was not sprung upon the people of the churches; and it is significant that, in the critical times which have followed the decision of the House of Lords, there have been no defections. The congregations which went into the Union remain in it in spite of the transfer of property.

The United Presbyterians entered the Union unanimously, the Free Church by a majority vote only. It is true that the majority

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was 642 to 27, but the minority probably represented a much larger body of opinion in the church than its numbers seem to indicate. It had steadily dwindled as the Union became more and more certain of accomplishment; but could the decision of the House of Lords have been foreseen it would have been very much more considerable. It was unfortunate that this minority was confined mainly to the Western Highlands and was influential neither in numbers, wealth nor learning. It was also unfortunately not on a self-sustaining basis. There was probably a hope that circumstances would compel the minority to acquiesce in the Union or prevent them from maintaining an attitude of schism; and nothing was done to safeguard the financial position of the minority whose churches, manses *etc.* were claimed as the property of the United Church. Doubtless the point was well considered, but to one outside ecclesiastical courts it does appear that generosity was lacking in the treatment of the minority by the majority. Even an obscurantist minority has its rights when it merely stands by the *status quo.* Its members were practically expelled from the church because they would not change. It is true that their churches and manses had been built and their salaries paid largely by the Lowlanders who wanted the Union; but they had long been accustomed, and encouraged, to regard themselves not only as the salt of the earth but as the salt of the Free Church, which was more important. Of late years deference to their Highland virtues had become hypocritical when it was not perfunctory. Nevertheless this deference seemed to justify them in maintaining an opposition to a Union in which their importance would have been diminished greatly, for the United Presbyterians were exclusively Lowlanders.

Whatever may have been the hopes of the church leaders, the minority did not acquiesce but appealed to the law courts to have it declared that they were the Free Church of Scotland and were entitled to all the property of that body as it existed before the Union in 1900. The action was brought before the lord ordinary of the Scottish court of session, and decision was given against them. They appealed to the second division, and the decision of the lord ordinary was unanimously sustained. Then appeal was taken to the House of Lords, and there they secured a judgment

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declaring them the true Free Church of Scotland and therefore entitled to the property, of which they have since been put in possession.

The grounds of their appeal were, first, the doctrinal defection of the Free Church from the Confession of Faith, as shown by the declaratory act of 1892, and, second, the entering into a union with the United Presbyterian Church in 1900, leaving the question of establishment an open question. The defence of the majority was that the declaratory act involved no defection from the confessional standard, and that, if it did, the change was entirely within the church's competence; and, secondly, that the doctrine of an establishment never had been a standard, that, if it had, it had not been departed from because it remained an open question, and that the change in any case was within the church's competence.

It is difficult to see the relevance of the purely doctrinal issue, because the Union was subsequent to the declaratory act and those who raised the action had, by remaining in the church, been consenting (although protesting) parties. The seceders who formed the Free Presbyterian Church in consequence of the declaratory act would have been the proper parties to raise this issue. It must however have been admissible, for it was dealt with at great length; and a cynical public had the entertainment of seeing the Lord Chancellor Halsbury pose as a theologian, while Mr. Haldane, the subtlest philosophic mind in England, vainly strove to convince him of the possibility of what philosophers call an antinomy and theologians, more modestly, a mystery. The lord chancellor was neither to be convinced nor daunted and valorously applied the yea or nay of criminal law to the relations of God to His universe and to man. The other judges more wisely declined this issue and based their decision simply on the concrete question of the establishment principle, which by a majority they declared to be a fundamental and essential principle of the Free Church as constituted at the Disruption in 1843. The policy of leaving the establishment principle an open question at the Union they declared to be inadmissible and a mere subterfuge; a Union upon the basis of an open question, a merely colorable union; and the United Church, a church without a religion. They based

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their decision entirely upon the documents, which they termed the articles of a church's association, and they brought the property of the church under the strict interpretation of the law of trusts. They refused to accept the church's own interpretation of the documents and emphatically denied the power of the church to alter the terms or depart from the letter of the documents or articles of its association. When the counsel of the United Free Church claimed that the church had the right to amend its own standards of faith and doctrine, the judges demanded documentary evidence that the claim to spiritual independence had ever been made, or being made had ever been sustained by the state. The claim to legislative power or spiritual independence they dismissed as incompatible with the law of trusts; and they held that, inasmuch as the United Free Church did not take the same attitude to the question of establishment as the Disruption Fathers had done, therefore the members of the Free Church who had consented to the Union had ceased to be the Free Church and were bound to denude themselves of the property which had belonged to that church. They did not deny the right of two churches to unite; but, since one of the two must surrender some essential principle or at least consent toi regard it as an open question, they laid it down as the final decison of the law that such a union involved a breach of trust and therefore a loss of all the property of one or other or both of the uniting bodies. The question of the actual intentions of those who had contributed to build up the property of the church was held to be decided by the wording of the documents. As a matter of fact, the largest part of the property of the church has been acquired since 1870, when the Free Church declared that there was no bar in principle to union with the United Presbyterians; but this fact was not pressed on the attention of the law lords. Since the decision it has been made much of, and it will doubtless be duly considered in framing the legislation which is now seen to be inevitable. Similarly the court did not consider whether the minority were capable of administering the immense property handed over to them in trust or whether it was not a greater breach of trust to fail in administration than to leave the establishment principle an open question. This however is probably a political rather than a legal issue.

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The interest of the case from the point of view of political science is its bearing, first, on the relations of church and state and, second, on the question: what constitutes the identity of a church or indeed of any other association or institution? On the first point it is sufficient to say that it reduces every free church in the British Empire that has a creed to the same position of dependence on the state which the established churches occupy, without the compensating advantages of state endowment and recognition. Indeed one might go further and say that it places the free churches in a worse position than the state churches as regards independence, for it subjects them to the obscurantism of their most discontented members. In these days Parliament is not likely to interfere with the doctrinal standards of a state church so long as a conventional deference is paid to authority. Certainly no individual can sue a state church for breach of trust, while a free church is open to such vexatious proceedings.

On the second point the decision of the law lords involves the assertions that every solemn declaration made by a church or denomination at the time of its origin is essential and fundamental and perpetually binding; that the church as a church has no power over its standards, subordinate or other; that to depart from any of its principles is a breach of trust; and that to maintain such a departure deprives the church of its identity and constitutes it a new association, with a new set of articles having no relation to the old, and with no right in its property. The establishment principle was declared to be a fundamental and original article of association of the Free Church, and Dr. Chalmers was freely quoted to show that he repudiated voluntaryism and would have no dealings with voluntaries. In fact, Dr. Chalmers's main argument for an established church is found in his economical writings; and to place a disputable economic conclusion on the same footing as a belief in the resurrection of the Lord Jesus Christ as an essential basis of a church's life is, to say the least of it, a curious consequence of the decision. However there can be little dispute about the fact that in relation to the question of an establishment the body of Free Church opinion has changed. Opinions may differ as to the importance attached to it at any time in the history of the Free Church: it never was a condition either of mem-

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bership or of ordination:[1] but there is no doubt that the Free Church in 1900 attached less importance to it than did the Disruption Fathers in 1843. The question is: had its members any right thus to change ecclesiastical values? They claim that they had; and, since the decision, the need for spiritual independence has reconciled many to the loss of property. The assertion of legislative power — for that is what spiritual independence means — has been so emphatic that even judges who base decisions exclusively upon written documents must be convinced that this claim is really an essential part of Scottish Presbyterianism. The identity of a church, according to the law lords, depends upon its acceptance of its original documents. One wonders what those lords would say should the identity of the former United Presbyterian Church and the ownership of its property be disputed on the ground that, in the original official document of the Secession Church from which it sprang, "Judicial Testimony" was solemnly raised against the state for failing to enforce the penal laws against witchcraft! The identity of a church which claims and is allowed spiritual independence must rest on something else than mere acceptance of early documents, drawn up in the light of the enthusiasms and the prejudices of the moment and expressed in the language familiar to the then living generation.

Wherein does the identity of a church consist? The theory of the House of Lords, as we have seen, is that it consists in identity of doctrine. This theory was disputed by the counsel of the United Free Church and it has been rejected by the leaders of that church. To the lord chancellor's question: "If there is such a thing as a church, . . . is not identity of doctrine one of the component parts of the identity of the church?" Mr. Haldane answered "No." The lord chancellor seemed inclined, throughout the hearing, to identify liberty and license, and he pressed the difficulty that, with the liberty of modifying its doctrine, the church might become Roman Catholic or even Mohammedan. Confronted with these considerations, Mr. Haldane qualified his denial.

[1] Except in so far as it is involved in the Confession of Faith, which deals with the relation of the civil magistrate to the church.

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I answer no [he said], because the church has power to change doctrine; but in order to do that, it must be the church, and it ceases to be the church if it repudiates certain things which are vital to its existence, the headship of Christ, His word as the only rule and, I think, also the Presbyterian form of government.

But the leaders of the church are bolder than its counsel. They explicitly deny that the identity of the church depends on the stereotyping of its doctrine, and assert that from the dangers of liberty, which loom so large before the eyes of the lord chancellor, the spirit of God, acting in the church, will preserve His church: a statement which may not carry much weight in a court of law, but suffices none the less to differentiate the church from all other associations, as something more and other than a human association. A few days after the decision of the House of Lords was rendered, Professor Dods declared:

Come what will, a church is bound to maintain her right to alter her confession. It is essential to the very nature of a confession that a church has the right to change it. A church's confession must be the real expression of the mind of the church as presently existing. A church cannot merely say: this was the confession established by law on this basis and whose emoluments we are inheriting. It cannot merely say: this confession we received from our fathers and we have accommodated ourselves to it until now we are quite cast in its mould and have got our beliefs squared with its form and have abandoned whatever could not be restricted by its bounds. If the confession of a church is to be true, it must be the free utterance of her actual belief. The confession, in short, must be the confession of the church, and not the church the church of the confession. She must make it and not it her.

Another leader of the church, Principal Rainy, characterized as "ungodly" the view that the church has no power to change its confession.

But if the identity of a church does not rest on identity of doctrine, on what does it rest? The question may, perhaps, best be answered by asking: wherein does the identity of any association consist? For the church is, like other associations, an organization of the environment for the attaining of certain ends and sat-

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isfying certain desires and aspirations of men. That these aspirations are spiritual and higher than other aspirations for which other associations exist, does not alter the positive and political character of a church as distinct from its spiritual and mystical character. It is an organization like the state or the family or the clan, the club or the lodge, the trust or the trade union; and it shares with them a certain common character, of course with certain very obvious differences. What then is the identity of any other association? Does it consist in its being faithful to its original object or plan? Hardly, for it is only minor and, in a sense, artificial and consciously created associations that have any memorandum or statement of the ends which they were formed and organized to attain. The great primitive associations grew up naturally to meet a pressing but quite unformulated demand. They did not begin with a written constitution. The state, the family, the clan, had each its object, which the political theorist no doubt may formulate; but it is only for science that such an association can remain faithful to an unwritten constitution when conditions are changing. An unchanging association implies not only the permanent and unvaried existence of the aspiration to which it corresponds, but the permanence of the environment, which, as a matter of fact, is profoundly modified by the very formation of the association. Life and human aspirations and human environment were not the same after the institution of the family as before it; and changes in the family have slowly become necessary on that account. None of the great natural associations has remained faithful to its original object, except as that may be formulated abstractly by the political scientist; but we acknowledge their identity none the less through all their changes.

Nor in the case of minor and artificial associations which have written memoranda or constitutions setting forth their original object, can we assert that they remain faithful to it. In name they may adhere to it; but there usually has been change, be it recognized or unrecognized. Generally it is a change to a lower level. The first inspiration of the founder is lost. The club or association founded for the promotion of letters or science, or for mutual improvement, degenerates by easy stages into the conventional club of amusement or recreation. On the other hand there are

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not lacking notable instances where the original object has been transcended, and an association formed for trade and dividend rises to a truly national or imperial mission. Such instances are afforded by the Bank of England and the East India Company. The Bank of England began as a finance company to lend money to the government, and its early operations were so much open to question from the public point of view that there was no obvious absurdity in its being classed with the South Sea Bubble in 1720. But its subsequent career has been marked by a public spirit which its origin and its constitution give us no right to expect. Bagehot's *Lombard Street* has familiarized most readers with the idea that there is a duty which the bank is expected to fulfil as guardian of the money market and of the financial stability of the United Kingdom. Yet to fulfil this duty it must frequently sacrifice its duty to earn dividends for its shareholders. This particular association, then, has acquired a new and a higher end; but there has been no breach of continuity or identity. The East India Company shows the same elevation above its origin without loss of identity. It was organized purely for the purposes of trade; it acquired territory in defence of its trade or to promote its trade; it became one of the instruments of imperial expansion and consolidation, till finally it was forbidden to trade at all. But in all this radical change it remained the same East India Company; and John Stuart Mill, in penning its final apologia, could deal with its continuous history, treating it through all its changes as identical with the modest society chartered by Elizabeth.

The state itself, the greatest of the purely natural organizations, has suffered many changes. Throughout all those changes no doubt it has remained faithful to the end which political science has formulated, *viz.*, the organization of the material, or of part of the material, conditions of social life, *i.e.*, the maintenance of law and order and security; but this fidelity has not prevented the most radical changes. Consider the changes which France has undergone in the course of a century. It has been republican and absolutist; clerical and anticlerical; conservative and communist; and yet through all these revolutionary changes it has retained its identity. The policy of a state, domestic and external, may vary; its constitution may be thrown into the melting pot; its institu-

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tions may change and public opinion may alter on all manner of questions; but the state retains its identity and may retain it even when subject to a foreign conqueror.

And if change is possible in all the natural associations and still more (with the sanction, granted or implied, of the state) in all the more deliberate and artificial associations, until the existing association may appear to have nothing in common with the original but the name; and if through all such changes the identity of the association is retained; why should the church be unchangeable and stereotyped save at the expense of its identity? The church is indeed an association of a unique type. It has a dual origin, a spiritual and a natural. It is one of the primary institutions like the clan, the family, the state; but like the minor and artificial associations, it has from the first a written constitution. It appeals or appears to appeal to immutable truth as its foundation, and yet it claims as part of its heritage the legislative right to determine its own doctrine. This is no vagary of a modern church in legal difficulties. It is inherent in the very idea of the church and is based on its spiritual more than on its natural origin. All human societies in virtue of the needs they satisfy may be said to have a natural legislative power, laying down hypothetical imperatives for their members; but most of them have seen fit to resign that power into the hands of the state. But while other associations may yield up their legislative right and commend themselves to the state as to a feudal superior, receiving back their own again in a modified fashion, the church, even when established, has never admitted without reservation the supremacy of the state or wholly surrendered its claim to legislative power It has tolerated endowment because it hoped either to dominate the state or to evade its Erastian dominion.

The relation of church and state forms one of the most interesting and instructive chapters in political science. The state, which in the abstract has the comparatively lowly function of organizing a part of the material environment, has yet come to be supreme over all other associations. It was the servant of all; it has become the master of all. Without the security of law and order, no higher organization could continue; and because there was much overlapping of institutions and organizations, because the

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family and the clan and the guild, the feudal system and the municipality could not adjust their spheres, they have all been superseded by or subordinated to the state; and the power which they originally had, of being a law to themselves and regulating their own members by that law, has been taken from them and absorbed by the state. They may have received back again the power to make their own by-laws, as a railway company may receive such power; or they may be so insignificant that if they do not obtrude themselves they will not attract the attention and the jealous supervision of the state; but the state brooks no rival and admits no legislative authority but its own. The state does not deny that changes in the constitution of an association may become necessary, but it claims the right to initiate or at least to sanction such changes. It may even take it upon itself to change an institution that has no desire to change: witness its radical dealing with educational and charitable endowments. In general, although the state cannot prevent changes of opinion and aspiration among members of an association, it may prevent these changes from resulting in changes of organization. The state, it goes without saying, is neither omniscient nor omnipotent, and modifications may take place without its knowledge or consent; but when this modification is great enough to attract notice, the state interferes if it thinks the matter of importance.

The church, however, has never admitted the right of the state to deprive it of its legislative power. It still claims to determine its own conditions of membership, to lay down its own objects and to choose its own methods. The freedom of the church at times has, in a sense, been compromised for the sake of endowments, and Parliament may claim the right to determine the creeds and confessions of national churches. But such a claim is not pushed very far. The spiritual freedom of the church to determine its own affairs is not seriously restricted. It modifies and adds to and subtracts from its articles, in the main, as it pleases. The only thing that is barred is the embodiment of these changes in systematic form, or the repudiation of the legally accepted formula. There may be a question of honesty for individual consciences here (though that is an arguable point), but there is not much restraint of the freedom claimed by the church to be its own law-giver in its own affairs.

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In one matter only has the church accepted a position of subordination to the state. Its organization rests on material conditions. It requires, and has acquired, property for the due performance of its functions, the carrying out of its mission; and one of the main functions of the state is to regulate the conditions under which property is held and to secure the peaceful possession of those entitled to hold it. Even the most perfervent advocate of individualism admits this as a necessary function of the state; and the church as an owner of property comes under the jurisdiction of the state and admits it. This is the reason for the Free Church appeal case. Property is involved. The United Free Church claims the property by right of succession to the Free Church. It claims that the property belonged to the Free Church as a legislative body, subject to all the changes possible in such a body. The attitude of the court is apparently that the church holds its property in trust; that the terms of the trust are fixed by the *ipsissima verba* of certain documents; and that to change a doctrine after acquiring property is a breach of trust. In other words, the state, acting through its courts, says to every church: your property or your legislative character. Or, since immobility is death, it virtually says: your property or your life. The details of the case are not of universal interest, but the aggression of the state on the church is. If the state refuses to take the legislative character of the church into account in determining the ownership of property, it asserts as great a control over the free churches as it claims to have over state churches; and since property is essential even to a sect the moment after disruption, it deprives the church in all its forms and organizations of its spiritual freedom.

Yet it must be admitted that the assertion on the part of a church of power to change indefinitely its creed or confession is somewhat startling; and the natural man is apt to ask, with the lord chancellor, where is it going to end? Could a Christian church become Mohammedan or a Protestant denomination Roman Catholic? To which the answer might be: where is the legislative power of the state going to end? Might it not decree the absolute abolition of the family or the reëstablishment of slavery, or legitimize theft and deceit? Neither church nor state will do these things, for neither church nor state is independent of

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its members, and human nature does not change so radically. Omitting the *tu quoque*, however, there is a question at issue: how far can the church change and retain its identity? Even Mr. Haldane set up limits — the headship of Christ, the word of God, and, in the case at bar, the Presbyterian form of government; and it is to be noted that Professor Dods says that it is the confession, not the Christian faith, over which the church has power. How far does the power of change go?

It is necessary to make a distinction which, if it had been made, might have saved the lord chancellor from asking his question whether a church could become Mohammedan — the distinction between the Christian church and the Christian churches or, as we may say with apologies, between the church and its denominations. A Christian church or denomination could not become Mohammedan. All of its members might, but *ipso facto* they would cease to be able or to wish to claim the title of Christian. For the Christian religion is in its essence exclusive and claims the sole allegiance of its adherents. The sole headship of Christ is the distinguishing mark. No amount of legislative power can alter the exclusive claim. It may suit the type of mind that loves to reconcile the irreconcilable and to "know so many things that aren't so" to regard Mohammed as the last of the apostles or Buddhism as an esoteric form of Christianity; but the point at issue is not how much may Christianity comprehend, but who is its supreme head. The headship of Christ is not compatible with the headship of Mohammed or the supremacy of Buddha or the equality of the gods of Greece and Rome. There may be the most divergent ideas regarding Christ himself. There has been Arian as well as Trinitarian Christianity; but whether the Christ be mere man or mere God, he is the head of the church which bears his name; and an organization which repudiated him or ignored him, or even subordinated him, might be a church and might profess a religion, but it would not be a Christian church nor its religion the Christian religion. That is the great limit to the legislative power of a Christian church to change its doctrine; but it is a limit which lies in the fundamental laws of thought and in the accepted historical fact that Christianity is not, like paganism in its decline, ready to accept new gods.

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For Christianity there is no visible and material organization corresponding to the idea of the church universal. The Christian church is embodied in Christian churches or denominations, and each of these has its own justification for existence. The first and greatest is of course that it is Christian. That is the genus to which it belongs, and the difference which constitutes it a denomination or a church in the positive sense is quite another matter. In general, we may say that this difference is an emphasis or over-emphasis of some doctrine more widely held, or a peculiar type of organization which has been evolved with a view to promoting in the most efficient way the mission of the church.

To take a concrete instance: the doctrine of adult baptism (plus, no doubt, other characteristics in the matter of church government) constitutes the Baptists a separate denomination. The genus is, as always, more important than the difference. It is a fact of cardinal importance which is often forgotten that every denomination values its differentiæ only because of and in proportion to their bearing on the realization of the genus. It is Christian first, denominational afterwards; and it is denominational only to be the more effectively Christian. There may have been times and occasions when denominationalism ran mad and a sect thought more of its differentia than of its genus; but such excess of denominationalism is comparatively rare. The differentia is embodied in its subordinate standards, and is not what constitutes it a church, but what constitutes it a denomination.

May then a denomination, in virtue of its legislative power as a church of Christ, and as a human association which has not acknowledged the supremacy of the state, exercise that power so as to alter its accepted differentia? If it so exercises its power, does it remain the same? Does it retain its identity? The question is, to take the same instance, could the Baptists abandon the doctrine of adult baptism and retain their identity as Baptists? The question is not readily to be decided in the negative, for the negative answer stereotypes denominationalism and forbids change even in the direction of greater unity among Christians. As a matter of fact, denominations have altered their differentiæ through coming to see that the means they have insisted on for realizing the end of the church have not had the importance they once at-

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tached to them. Take, for instance, the fact that the Secession Church came out protesting its adherence to the Scottish Covenants; that is, facing backwards. Within a short time we find it facing towards the future and voluntaryism. Its leaders had, in reality, misstated its differentia, because the language of the Covenants was still the conventional religious dialect of their age; and it was long before they found the proper expression for the differentia of their church. Take another episode in its history. The Secession had hardly taken place before the Seceders split over the burgess oath, forming the two bodies, the Burghers and the Anti-Burghers. The point at issue was of some little practical importance at the time, for the laws of the trade guilds still held in Scotland; but this difference — the attitude of the respective bodies to the burgess oath — rapidly ceased to be of any importance and early in the nineteenth century the churches reunited. Yet it would be absurd to say that either the Burgher or the Anti-Burgher organization lost its identity. Views on the burgess oath had long been so small an element in the identity of either body that the union made no breach in the continuity of their sympathies. Again, it is but seldom that a denomination is constituted by one single difference; for practical distinctions are not drawn with the precision of formal logic. Thus the Baptist denomination is constituted by more than its belief in adult baptism. And it is conceivable that experience might induce a denomination to change or abandon one of its differentiæ and yet retain the others. It might cease to emphasize a doctrine and retain its form of organization. But to put again the crucial instance; is adult baptism an essential element of the identity of the Baptist denomination? Adult baptism is what the Baptists stand for in public estimation; and although public estimation does not make identity, it is at least fairly strong evidence as regards identity. Could the Baptist denomination abandon adult baptism and remain Baptist? To a certain extent, yes. The denomination could cease, as it does in many congregations to-day, to insist on close communion and yet retain its identity. It could even make the question an open question, and unite with another denomination on the basis of the greater importance of not overlapping, *etc.* There is a proposal to unite the Arminian Methodists and the

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Calvinist Presbyterians in Canada, to prevent overlapping in the West, though surely some means could be found of securing so desirable a result without yoking together two so incongruous elements. But further than this union on the basis of leaving adult baptism an open question, the denomination probably could not go. It could not admit that adult baptism was wrong, that paedo-baptism was right, without breaking so completely with its past that sympathy could not reach round the break. For it is essential to the identity of a denomination, as it is to the identity of an individual, that there should be no breach in sympathy with the past. The individual may indeed suffer violent change, may hate what once he loved and love what once he hated, may in short by process of conversion become a "new man"; but still his past is his own past, with which he is in especial sympathy. At first he may think his identity is changed, but the sympathy reasserts itself. So in the history of denominations. The disruption or secession seems to be final and irreparable, and the break with the past seems to create a great gulf. But time heals all breaches, and sympathy may once more reach round and appropriate the past. The individual, in spite of changes of body, of opinion and belief, of character and conduct, can hardly, while memory lasts, destroy his identity; and a denomination, while history is read, will find it hard to make such a decisive break with its past. Such breaks have occurred, as at the Reformation. It is true that the Reformation leaders never hesitated to claim their identity with the catholic and apostolic church, but they had to reach round a gap of centuries with which they had no sympathy. New denominations were formed at that time because there was such a breach of sympathy; and to most Protestants a re-union of their particular church with the Church of Rome would probably still mean a distinct break with their church's past, and therefore the destruction of their church's identity. It is this feeling which makes such re-union impossible. But short of making such a decisive breach with the past that sympathy must cease, the identity of a denomination can apparently survive any change of doctrine or organization; provided that the change is not made suddenly, and that it has been operative for a considerable time in the spirit before it is reduced to the letter of a formula.

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The identity of a church resembles the identity of a political party. When the split in the Liberal party took place in 1886, it was almost an open question which section remained the Liberal party. Both appealed to the principles of the Liberal party, and both claimed to be the true exponents of those principles. But the Unionists, after a long effort to treat their rivals as mere Gladstonians, had to recognize that the line of succession lay with the Home Rulers, who had managed to retain the party organization. It was the necessity of forming a new political organization that constituted the Unionists a separate party. Whether and how far the Unionists have retained their capacity for entering sympathetically into the history of the Liberal party — whether they can still say: this reform and that act of legislation was the work of our party — would not be easy to determine. The coalition with the Conservatives must have rendered the exercise of sympathy difficult to the rank and file. In the fiscal question a new principle of division has been introduced; and the Free Trade Unionists protest that the distinctive principle of the party has always been opposition to Irish home rule and that protection is an innovation with which the party as such has nothing to do. Mr. Chamberlain, who claims that the activity of the party need not be limited to one issue since it has power to adopt new principles, has captured the organization, and the Protectionist Unionists, who have accepted the Conservative position of their Conservative allies, will remain Unionists; while the Free Trade Unionists, who probably represent that section that has remained Liberal as well as Unionist, retaining a sympathy with and appropriating to themselves the history of Liberalism, will once more be forced to constitute themselves a new party.

In a church, as in a party, when a disruption or secession occurs that section which retains the organization regards itself, and is apt to be regarded as the years go by, as the church which has not changed. The innovation may really have been with them, but that is not the determining factor. It is not a question of mere majorities. The seceders may be in an actual majority; but in the absence of representative church government, or even on account of the anomalies of representative government, a minority may retain control. Under episcopal government it

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might easily be so, and the state connection may also operate to give control to minorities. The seceding body may loudly claim that they alone represent the true principles of the church to which they belonged, but in public estimation they are simply sectaries and the church continues elsewhere. Even had the Protestant reformers been in an actual majority in the Catholic Church, they could not have remained the Catholic Church, for the organization remained with the popes and cardinals.

The continuous control of the organization is an important element in determining the continuous identity of a church, because the sympathies of the members naturally attach themselves to the organization. At times large numbers of men through their devotion to principle rise superior to the natural ties of association and sympathy; but in ordinary life, and for most men, it is the organization rather than the principle that attracts. Men belong to this church or to that church because they were born into it, because their fathers belonged to it, rather than because they have reasoned out the relative claims of conflicting denominations. The continuity of organization is therefore what we may call the external side of the identity of any institution, and of the church among others. It is, however, the external side only; the inner side is the possibility of sympathy with the history of the institution, and of appropriating in a peculiar and personal manner the incidents of that history as one's own. The continuity of organization is not absolutely essential, for the Protestant reformers who called the pope antichrist were able to reach round, so to speak, and appropriate the history of the early church as their own. Similarity of doctrine and opinion makes this sympathetic appropriation so much the more easy; and since the Christian element is so much more important in a church's life than the denominational element, there is great scope for this sympathy. But just because of the admitted relative unimportance of the denominational element, a church may undergo very large changes of doctrine and creed without destroying its sympathy with its own past. So long as there is no decisive break with the past, no absolute denial of that which has been held to constitute the denomination, sympathy may continue and with sympathy identity.

JOHN DAVIDSON.

TORPHINS, SCOTLAND.

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RUSSIA'S STRUGGLE WITH AUTOCRACY.

BECAUSE of the absence in Russia of freedom of the press, private letters circulate from hand to hand in hundreds of copies. Three years ago, such a letter from a well-known Slavophil, publicist and financier commanded interest because its writer was a man generally regarded as a faithful adherent of autocracy. The letter was written soon after von Plehve's predecessor Sipyagin was killed by a Russian student named Balmasheff. To-day it seems to deserve a modest place in Russian political literature on account of the prophecies it contained, some of which have already been fulfilled. Here are a few of its passages:

I am writing under the depressing influence of the murder of Sipyagin. I can bear the sad testimony that a part of the public is utterly indifferent, while on the other hand the masses are happy. Yes, political assassinations have become an every-day occurrence, almost a sport. The public sees with its own eyes the growing power of the revolution and the total failure of the authorities. A crowd can be dispersed, students exiled, the newspapers silenced, but what can you do with creatures that are willing to sacrifice their own lives and know how to shoot? The murder of Sipyagin is especially terrible because the job was done so neatly. It contains the open threat that to-morrow the same will happen to any other secretary of the interior who shall continue Sipyagin's policy. And if that is so, if that should happen, where shall we then land?

You must agree that for the government this struggle is hopeless. The government may refuse to capitulate and may stubbornly continue the present policy . . . Well, the revolutionists will not capitulate either. Assassinations will continue, and with each new victory of the revolution will grow our social demoralization and our consciousness of the total helplessness of the government. It is easy to see that the logical end of it is the fall of the autocratic régime, for the very simple reason that a constitution is the only way out of this awful situation.

In other words, the revolution will outlast our present so-called conservative tendency and will force a capitulation. This is the more probable because, first of all, the present bureaucratic régime has absolutely no future, *i. e.* it is organically impossible for a bureaucracy to

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satisfy the public, and because, secondly, all the living forces of our society hate the present régime heart and soul.

And there are good grounds for this hatred. This régime has for years levied real war upon its own people. Its motto is extermination of everything spiritual, extermination of all social self-reliance, extermination of all opposition to bureaucracy even if this opposition is sincerely devoted to autocracy and is loyal to the fundamental principles of our government. Our bureaucracy insists that no one shall dare to reason for himself, that everyone shall be silent and obedient. Nor is that enough; the system demands that every Russian be completely indifferent to the fact that Russia is rapidly growing destitute and barbarous.

There can be only one autocrat, but we have an unnumbered multitude of them. In our bureaucratic system every minister, every governor, in fact, every policeman regards himself as an autocrat and acts accordingly. And because of these autocrats Russia groans in agony from one end of the empire to the other. . . .

Of chief interest in this letter is the fact that three years ago its writer regarded Russia as already in a state of revolution. Any one of us, witnessing political murders in his country, might regard the situation as grave, the condition as one of anarchy. But this man of affairs recognizes, not in a statement made on the spur of the moment but in a carefully developed argument, that these systematic murders are the Russian revolution, bound to drive the government to concessions and bound to end in a constitution.

Entirely apart from its bearings upon the Russian situation, the proposition is a striking one from a general sociological and historical point of view. It is an entirely new conception of a revolution. By that term we have hitherto understood what our past experience has given us—the armed uprising of the people, the people in arms—and we find it difficult to regard this new type of revolution as anything but a series of cases of foul play. Of revolution of the older type the British poet could say to his country:

> Strong mother of a lion-line,
> Be proud of those strong sons of thine
> Who wrenched their rights from thee!

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but what will the future poet be able to write about a revolution in which there were few agents, and these to all outward appearances very closely resembled a Czolgosz, a Caserio, a Lucheni, *i. e.* criminals of a most objectionable type? The appeal to sentiment will assuredly be found more difficult. But how will it be with the historian of the future who endeavors to view the matter rationally? Will he not learn that the grand finale of a revolution, the pyrotechnical part of it, is after all but an insignificant element? It is obvious that a Ludwig Feuerbach, a Freiligrath, a Herwegh, and a Karl Ruge played a more important part in the German revolution of March, 1848, than those eight-score men who were shot on the Berlin barricades. The general political, social and economic conditions of a country prepare the way for a revolution, and a literature that reflects these conditions and directs public opinion precipitates it. The social and economic status also determines the qualitative and quantitative strength of the revolutionary opposition. These are the sole permanent elements of a revolution. The form of the actual contest adjusts itself to the local environment.

Circumstances do not now favor an old-fashioned revolution. If it succeeds, it succeeds in spite of them. In fact, there was no instance in the nineteenth century of a victorious revolution won by arms. All were victories of moral suasion. No less an authority on revolutionary matters than the late Friedrich Engels, himself a revolutionist and a student throughout his long life of military science, comes exactly to this conclusion. The methods of 1848, he tells us, became antiquated with the development of modern weapons.[1] In fact, already in 1830 and 1848 the chief use of the barricades was to shake the loyalty of the national guards and with their help that of the regular troops.[2] And for

[1] See Engels' introduction to Karl Marx, Die Klassenkämpfe in Frankreich 1848-1850, Berlin, 1895, p. 7.

[2] Machen wir uns keine Illusionen darüber: ein wirklicher Sieg des Aufstandes über das Militär im Strassenkampf, ein Sieg wie zwischen zwei Armeen, gehört zu den grössten Seltenheiten. Darauf hatten aber die Insurgenten es eben so selten angelegt. Es handelte sich für sie nur darum, die Truppen mürbe zu machen durch moralische Einflüsse, die beim Kampf zwischen den Armeen zweier kriegsführender Länder garnicht oder doch in weit geringerem Grad in's Spiel kommen. Gelingtes, so versagt die Truppe, oder die Befehlshaber verlieren den Kopf, und der

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that reason Engels persistently warned the German social democracy against the revolutionary methods of the past. No matter how great the number of the German social democrats might be, he held they had absolutely no chance against even a small but well-disciplined band of soldiery.[1]

Writing at a time when events are moving fast in St. Petersburg, it would be dangerous to attempt to forecast even the immediate future. In estimating the chance of success through moral pressure, it must be borne in mind that no contemporary European government places so small a value on human life as does the Russian. The shooting of 1000 or even 10,000 insurgents would occasion little discomfort to the czar's bureaucracy. Participants in peaceful demonstrations have been clubbed to death in Petersburg, flogged in Vilna, shot in the back while fleeing to Zlatoust. In each of these cases his majesty expressed his imperial thanks to those who so energetically suppressed the unlawful gatherings. There has been nothing in past history to lead the Russian insurgents to believe that by sacrificing themselves *en masse* they would exercise the slightest moral pressure on the government. The government has been used to it. At the imperial coronation ten years ago 6000 men and women were trampled to death; the czar was in favor of an investigation; but it was pointed out that an investigation would unearth graft as the cause of the catastrophe, and the investigation was dropped. Many thousands of harmless and peaceful Chinese were drowned in the Amoor by order of a Russian general a few years ago. No investigation was even suggested. The outcry throughout Europe about the

Aufstand siegt... Die zahlreiche Erfolge der Insurgenten bis 1848 sind sehr mannichfachen Ursachen geschuldet. In Paris, Juli 1830 und Februar 1848, wie in den meisten spanischen Strassenkämpfen, stand zwischen den Insurgenten und dem Militär eine Bürgerwehr, die entweder direct auf Seite des Aufstandes trat, oder aber durch laue unentschiedene Haltung die Truppen ebenfalls in's Schwanken brachte und dem Aufstand obendrein Waffen lieferte. Da, wo diese Bürgerwehr von vorneherein gegen den Aufstand auftrat, wie Juni 1848 in Paris, wurde dieser auch besiegt." *Ibid.* pp. 13, 14.

[1] "Versteht der Leser nun weshalb die herrschenden Klassen uns platterdings dahin bringen wollen, wo die Flinte schiesst und der Säbel haut? Warum man uns heute der Feigheit zieht, weil wir uns nicht ohne weiteres auf die Strasse begeben, wo wir der Niederlage im Voraus gewiss sind? Warum man uns so inständig anfleht, wir möchten doch endlich Kanonenfutter spielen?" *Ibid.* p. 15.

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Kishineff affair, about the Dogger Bank affair, and about dozens of other affairs, were simply incomprehensible to his majesty's government.

On the other hand, when Engels was talking pessimistically about the possibilities of a revolution, he had in mind Western Europe and class revolutions, *i. e.* proletarian revolutions; and he certainly had good cause for expressing himself pessimistically about the outcome of such an enterprise. A social democratic revolution is not a revolution against the government alone; it is also a revolution against the upper and middle classes of society, who in self-defence are sure to give their hearty support to the government. That such a revolution would be a complete fiasco is a foregone conclusion. In Russia the conditions are wholly different. The Russian revolution is a revolution in the name of guarantees of life and of liberty; it is a revolution of all classes of society against autocracy. This does not mean that the Russian opposition forms one compact body; there are innumerable oppositional organizations, with different programmes and different tactics, from the mildest liberals down to extreme revolutionists of the bomb-throwing variety. But they have learned their lesson and they know that their strength is in working together. Therefore the peculiarly broad sympathies of the individual revolutionists, their subconscious desire to appeal to the widest possible constituency. Therefore one finds socialists in the highest aristocracy and among the largest land owners, while on the other hand the terrorists demand nothing more than the convocation of a constituent assembly and freedom of press, of speech and of conscience. That is why such natural enemies as the old-fashioned free-trader and the socialist are friendly so far as the political struggle is concerned; that is why there is an invisible bond between many high dignitaries of state in his majesty's immediate entourage and the extreme revolutionists. That is why bomb-throwers sympathize with the zemstvos, and the zemstvo presidents displayed little grief over the death of von Plehve.

No more clean-cut illustration of this could be had than a plea for Plehve's murderer which appeared in a recent number of the *Osvobozhdenie*, the central organ of the Russian liberals and the

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Russian zemstvos. The *Osvobozhdenie* is strongly opposed to political murder, and the anonymous author of the plea states emphatically and repeatedly in his letter that he is on principle an enemy of terroristic methods. On what then does he base his plea? Here is his argument:

Everybody (this anonymous writer maintains) sees that Russia is on the eve of a constitution. But whatever to-morrow may bring to Russia, it is already to-day. Since yesterday it has become easier to live in the land. The general policy is a liberal one. Whence this change? Did Plehve lose faith in the omnipotence of his crushing system and decide to change it? No. Did his enemies get rid of him by some intrigue? No; quite the opposite; it was Plehve that got rid of Witte. Did his majesty get rid of Plehve's bloody system of oppression? The facts are against it. His majesty graciously promoted Plehve's chief helpers, Messrs. Zinovieff, Sturmer and Prince Obolenski. What then was it that in a moment changed fundamentally the attitude of the government to the people? A very simple thing: a man came with a bomb which he threw at the all-powerful dictator of Russia. When the body—an obstacle—was dragged away from the highway, the question arose: where to go now? And all in unison—the people as well as the government, the liberals as well as the reactionary press, even his majesty's friend, Prince Meshcherski, and his majesty himself—all these agreed that it was not in the right direction that Plehve was leading Russia. Instantly the helm was put about and the ship of state started in the opposite direction. Plehve's soul has good reasons for valid complaint. It could ask: Why did his majesty and the reactionary press approve of his actions while he was in power? Why was he not told that a new man was needed in Russia? Why did they not graciously dismiss him in the usual way, rewarding him with the order of St. Andrew and a seat in the council of the empire? He would at least have remained alive. Or, on the other hand, it could ask: Why, if they did appreciate his work, do they not defend his memory? Why do they not continue his policies? Or did his majesty wait till by chance the bomb of an unknown terrorist freed him from Plehve, who had become a burden to both Russia and to his imperial master? But the fact is (the

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writer continues) that the bomb of Sozonoff, Plehve's assassin, pointed out to his majesty that the continuation of the reactionary régime was an impossibility. This bomb affected the thinking apparatus of the men in Russia's ruling spheres. No matter how much one may be opposed to terrorism, there is no way of denying facts. Plehve's murderer, voluntarily or involuntarily, by good or bad means, rendered a great service to Russian society and to the Russian empire. In view of the idealistic motives of the assassin and the beneficent results of his action, the author of the letter demands for him complete or at least partial amnesty.[1]

This reasoning, though easily answerable, is interesting because of the light it throws on the psychology of the man behind the argument. It indicates the sympathetic bonds that unite all the forces of the Russian opposition. It explains why, in the first and only case of political murder that was submitted to a Russian jury, in the case of Vera Zassulitch in 1878, the accused was declared not guilty.[2] It explains the social psychology of such facts as the following: In August, 1904, an attempt was made in the city of Belostok to kill the chief of police, P. U. Metlenko. The attempt failed. October 21 another attempt was made. The chief of police was fired upon six times, on a crowded street, and one of the shots wounded the victim. The would-be assassin escaped. There was a large crowd of witnesses, but nobody attempted to stop the murderer. On July 4 of the same year, in a crowded street of Elizavetpol, the vice-governor of the province, Andreyeff, was killed by five revolver shots in broad daylight. Hundreds saw the murder committed, but the murderer escaped. In exactly the same way Governor Bogdanovitch was killed last year. Broad daylight; plenty of witnesses; the murderer escaped. Precisely so were killed Boguslavski in Igdyr and Colonel Bykoff in Olta, and precisely so the murderers escaped. So was wounded the Governor Prince Obolenski and many others. Here again the people in the streets not only did not stop the murderers but evidently helped them to escape.

[1] *Osvobozhdenie*, no. 59, pp. 148, 149.

[2] See *Jahrbuch für Socialwissenschaften und Socialpolitik*, Zurich, 1879, vol. i, pp. 282-288. Also A. Thun, Geschichte der revolutionären Bewegung in Russland, Leipzig, 1883, pp. 156-160.

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One cannot assume from these instances that the bulk of the Russian opposition is terroristic in its nature. They only go to prove that the perpetrators of terroristic crimes, if their victims are particularly hateful oppressors, can count upon a very wide circle of sympathizers among average Russian citizens. This is why an exponent and apologist of Russian autocracy, N. K. Leontyeff, regarded the Russian liberals as

> half-nihilists, but more dangerous, because they do not fight openly, because they breathe safely under the uniform of a state official, in the professor's chair, on the judge's bench and especially in the clever and cunning articles of the liberal papers, which know at the proper time how to safeguard themselves with patriotic yells, with monarchistic exclamations, so that the hiss of the serpent and his treacherous coiling may not be noticed.[1]

In other words, it is often made to appear that the whole Russian revolutionary movement is tainted with anarchism. The Russian revolutionist is commonly called a nihilist and a Russian nihilist is commonly regarded as an anarchist. The objective and scholarly student of the Russian social movement could conscientiously state, on the contrary, that for about twenty years there has not been a single anarchist active in Russia; but he would have to admit that the daily press and public opinion outside of Russia had very good (although somewhat superficial) reasons for charging the Russian revolutionary movement with anarchism. First of all, the very origin of international anarchism is linked with the name of a Russian, Michael Bakunine, who up to his death in 1876 remained the center of the anarchistic movement in Switzerland, France and Italy. In the second place, Bakunine unquestionably influenced very considerably the Russian social movement during the seventies, *i. e.* exactly at the time when Western Europe and America began to take an interest in the so-called nihilistic movement in Russia. While keeping track of its outward and sensational manifestations, the American and Western Euro-

[1] Leontyeff, Vostok, Rossia i Slovyanstvo, Moscow, 1885, vol. ii, p. 109. See also Simkhovitch, "An Interpretation of Russian Autocracy," in *The International Quarterly*, October, 1904, pp. 3-5.

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pean press was not enough interested in the matter to follow up the gradual evolution of the movement, which soon enough freed itself entirely from its anarchistic elements. Thirdly, Russian political refugees, some of whom were anarchists, began to attract public attention, and the Russian political movement began to be judged by its refugees. With all due allowances for very numerous exceptions, political refugees are abnormal and embittered individuals, and nothing is more misleading than to judge a political movement by such exponents. The refugees, hostile to the society from which they are obliged to flee, have seldom a chance to get sound information about the social organization of the country in which they seek refuge. In their new environments they are, as a rule, taken up as heroes by native malcontent cranks and extremists of all sorts and conditions, and they gain a most distorted conception of their new surroundings. Add to this the passionate desire for political activity, which has obliged them to flee from their own country but which they have not abandoned in their flight, and you have before you, for the most part, set and stubborn, ignorant and dogmatic political cranks, who under some circumstances are dangerous and under all circumstances are bound to compromise themselves and any movement with which they are connected.[1] Lastly, close upon the heels of the terroristic attempts in Russia, followed the new political pest, the anarchistic "propaganda of the deed," which infested Western and Southwestern Europe. These murderers did not plead insanity, they pleaded "doctrines," and their crimes were classed by public opinion with the Russian political murders and classified as manifestations of murderous anarchism.

Now if the Russian revolution should take place largely or even to a minor extent with the help of anarchists, what is the future

[1] Interesting in this respect are utterances of Karl Marx about his former friend and later adversary, Willich. "Der gewaltsame Niederschlag einer Revolution lässt in den Köpfen ihrer Mitspieler, namentlich der vom heimischen Schauplatz ins Exil geschleuderten, eine Erschütterung zurück, welche selbst tüchtige Persönlichkeiten für kurzere oder längere Zeit sozusagen unzurechnungsfähig macht, Sie können sich nicht in den Gang der Geschichte finden, sie wollen nicht einsehen dass sich die Form der Bewegung verändert hat. Daher Konspirations und Revolutionsspielerei, gleich kompromittierlich für sie selbst und die Sache, in deren Dienst sie stehen." Karl Marx, Nachwort zu den Enthüllungen über den Kommunisten-Process zu Köln, Hottingen-Zurich, 1885, p. 72.

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that waits upon the Russian people? This question forces itself upon everyone who is interested in the Russian people. The answer is that even the most fanatical of the present-day Russian revolutionists, if judged not by analogy and not by inference but scientifically, could under no circumstances be classed as anarchists. Even in 1881 the Russian terrorists, the People's Will party, after their deed of March 1, offered to Alexander III complete suspension of their terroristic activities on condition that amnesty to political prisoners, convocation of free representatives of the people, freedom of press, free speech and freedom of political gatherings be granted to the Russian people.[1] They further pledged themselves to abide by all decisions of the representative assembly and never to oppose by force any government sanctioned by the representatives of the people. Would that be the attitude of anarchists?

Another interesting document issued by this party, which is responsible for all the political murders in Russia between 1879 and 1882, is its official manifesto on the occasion of the murder of President Garfield.[2] This manifesto reads as follows:

In expressing our deep sympathy with the American people, bereaved by the death of the president, James Abraham Garfield, the executive committee regards it as its duty to protest in the name of all Russian revolutionists against deeds of violence such as the murderous attempt of Guiteau. In a land where the freedom of the individual makes a struggle for ideals possible, where the free will of the people determines not only the law of the land but the personality of the ruler—in such a land political murder as a means of political struggle is of the very essence of despotism, a despotism of the very same type the extermination of which we regard as our task in Russia. The despotism of an individual or the despotism of a party is equally deplorable, and only then can violence find justification, when it is directed against violence.

THE EXECUTIVE COMMITTEE.

September 10, 1881.

In view of such statements it seems utterly impossible to class even the Russian terrorists of a quarter of a century ago as anar-

[1] Burceff, Za sto let, London, 1897, pp. 172-179. Also Kuklin, Itogi revolutionnago dvizhenia v Rossii. Geneva, 1903, pp. 45-50.

[2] Burceff, *op. cit.* p. 180; Kuklin, *op. cit.* p. 51.

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chists. Still less subject to such a charge are their successors who are now active in Russia. After each political murder committed by them they have regularly issued a manifesto demanding a constitution, freedom of press, of speech and of conscience. True, they do not state they will give up their political activity if a "bill of rights" is granted. The Russian terrorists call themselves socialists, and they declare their intention to continue their socialistic propaganda even under a constitutional régime, but of course without terroristic methods. Not only the terrorists but all the Russian radical revolutionary parties manifest socialistic inclinations, but nevertheless the historian of the Russian revolution would show a distinct lack of any historical or psychological sense if he should even for a moment regard socialism as a serious issue in the present Russian revolution. Pre-revolutionary socialism is but a manifestation of general pre-revolutionary radicalism; it is the poetry of the revolution. It is not a tendency that springs from the bottom of the social structure; it is rather a passionate although vague desire on the part of the privileged few to assimilate themselves with the many, to be a part of the great all-powerful mass and to act as representatives of this power — a power which after all, in spite of their sympathy, is to them strange and unknown. Really socialistic, of course, are the social democratic organizations of workingmen in Russian industrial centers. These are doctrinaire Marxists, and their organizations are strictly opposed to terrorism. The terrorists, on the other hand, are far from being proletarian in their character and composition.[1]

What actual strength does the Russian revolutionary movement

[1] Some light is thrown upon the character of the backing of the Russian terroristic movement by the regular printed acknowledgments of contributions received. In a recent list of this kind we find the following items: One of ours, 2,500 rubles; A. S., 150 rubles; L., 200 rubles; Sympathizer, 2,000 rubles; An artist, 2,000 rubles; A convert, 1,200 rubles; Gordui, 2,500 rubles; A friend, 2,700 rubles; X., 1,300 rubles; Kief, 300 rubles; Easygoing, 1,000 rubles; Through Mary, 2,000 rubles; A schoolboy from the Crimea, 10 rubles; A man, 3,000 rubles; A friend, 390 rubles; Zemstvo-men, 80 rubles; From Vilno, 200 rubles; From an old friend, 200 rubles; From F. K., 2,200 rubles; From N. K., 135 rubles. *Letuchi Listok Revolutionoy Rossii*, no. 4, p. 24.

It is evident that these are subscriptions of rich men. A student, a man of letters or the average professional man who has to earn his living can not afford to give 1,000, 2,000 or 3,000 rubles.

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represent? No accurate census can be taken and no accurate estimate is possible. Within the last six months the forces of the revolution have been multiplied, for the present situation favors a rapid growth of radicalism. The Russian social democratic organ *Iskra* calls the present moment the honeymoon of the opposition, a moment of revolutionary exaltation when democrats regard themselves as socialists, liberals figure as democrats, weak bureaucrats as liberals, and moderate reformers as revolutionists.[1] It certainly is an epoch the like of which Russia has never seen, and as regards both numbers and intensity, the movement leaves all European revolutions of the nineteenth century far behind.

This statement may seem to need support and explanation. Alexander II was in many respects a most excellent man, but he was a thoroughgoing autocrat with an intense dislike for anything like a democratic opposition. In many respects he was a man without reproach, but he was by no means a man without fear; and of him the Frenchman could justly say: "*quand il a peur, il est terrible.*" He started rather early in his career to exterminate the opposition by governmental and official terrorism. For the man, woman or even child that belonged to the opposition, no protection of law existed. The result was a tremendous spread of revolutionary sentiment toward the close of the seventies. So great was the revolutionary pressure that a man of the stamp of a Cavour, Count Loris-Mellikoff, was made dictator of Russia, a constitution was drafted and signed and was about to be promulgated, when that disastrous bomb put an end to the Russian monarch's life and to Loris-Mellikoff's constitution.

We all remember those days; we all remember the tremendous revolutionary agitation and the draconian reprisals that led up to the terrible deed. But the amount of political crime in those days (though by no means insignificant, since in the four years 1877–80 there were 62 political cases involving 629 persons) was nevertheless small as compared with the extraordinary outbreak of political crime in our own day, as is shown by the following statistics:[2]

[1] *Iskra*, no. 79, December 1, 1904.

[2] Alphons Thun, Geschichte der revolutionären Bewegung in Russland, Leipzig, 1883, p. 375. Thun uses the figures given in the Calendar of the Peoples' Will party.

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Year	Political Cases	Persons Involved
1871	2	88
1872	1	1
1874	1	13
1875	2	7
1876	5	12
1877	11	303
1878	8	30
1879	22	166
1880	21	130
1881	11	34

This, however, was only a prelude. The figures for the years 1894-1903, which coincide with the first decade of the reign of Emperor Nicholas II, are given in the following extract from a secret report (no. 4511) sent by the Russian secretary of justice to the council of the empire on January 28, 1904.[1]

Year	Political Cases, Department of Justice	Persons Involved	Political Cases, Administrative Process	Persons Involved
1894	158	919	56	559
1895	259	944	90	623
1896	309	1668	67	561
1897	289	1427	122	1474
1898	257	1144	149	1004
1899	338	1884	166	1325
1900	384	1580	144	1363
1901	520	1784	250	1238
1902	1053	3744	347	1678
1903	1988	5590	1522	6405

In the year 1903, 11,995 revolutionists were "disposed of" judicially or by administrative process with his majesty's approval. Such figures command respect, especially as they represent but a very small fraction of the active forces of the revolution. Twenty-five years ago the government was trying to get hold of everybody it could catch. This policy has been abandoned. It is physically impossible to arrest everybody known to the government to be a revolutionist, for there are too many of them. The tendency is

[1] This report was published by the central organ of the Russian Social Revolutionists, *Revolutionnaya Rossia*, no. 44, p. 14.

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therefore to get hold of the ringleaders and those who are particularly active.

The revolutionary movement of 1870-1880 is well characterized by Turgenieff in his *Poems in Prose* by a little story entitled "The workingmen and the man with white hands." The story consists of two dialogues. In the first the workingmen talk to the stranger whom they meet and who claims to be one of them. They doubt his claim because his hands are white; they point to their own working hands, which smell of tar, and they ask the stranger:

Of what do your hands smell?—Smell for yourselves.—It is strange! We should say they smell of iron.—Yes, of iron. For six whole years I have worn handcuffs on them.—Why?—Because I thought of your happiness. I wanted to make you poor fellows free; I rebelled against your oppressors; on that account I was put in prison.—Prison!—Yes. —Why were you rebellious?

The second dialogue takes place two years later. The same workingmen speak to one another about the gentleman who once talked with them.

He is to be hanged to-day; the order has come.—Has he been rebelling again?—Yes, again.—Well, Dmitri, don't you believe we could get a piece of the rope he is to be hanged with? They say it brings good luck to the house.—Yes, Peter, let us try.

And now? The bulk of the Russian workingmen are in the ranks of the revolution, they are well organized and take part even in student demonstrations. G. A. Gershuni, one of the leaders of the terrorist movement, who was recently sentenced, writes in his open letter to his comrades:

I know that my execution will be a terrible shock to you all, but I believe it will serve its purpose in the work of the revolution. Hard was death for the revolutionists of 1870-1880—they were so isolated—but we are now with the workingmen and the peasantry, and it is easier to die in our days. I do not know, maybe I am mistaken, but somehow I believe that our victory is close by, that near is the triumph of freedom and the triumph of the interests of the working people.[1]

[1] *Revolutionnaya Rossia*, no. 44, p. 24.

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It is impossible to deny that the revolutionists are with the workingmen, and the workingmen with them. The revolutionists are also with the peasantry; but is the peasantry with the revolutionists? To a limited extent only. The government, for dynastical reasons, has jealously and systematically prevented the spread of education and enlightenment among the people. Has his majesty's autocratic government profited by it? Not in the least. It has involved itself in contradictions, which only the present revolution can solve and straighten out. Autocracy is not all-powerful. It could perhaps bring society to a standstill, but it can not control the laws of social dynamics.

On account of its political and geographical position, Russia was forced to be a military power. "Military power" is a relative term. It means to be as strong as one or a number of neighbors. For Russia it meant to keep up the race with highly civilized, rich and industrially developed countries like Germany and England. But a poor agricultural Russia could never meet the demands, could never command the necessary resources. The Russian government was therefore forced to encourage the capitalistic and industrial development of the country. The program was to eat the cake and have it too, which was obviously a difficult proposition. The czar's government was desirous of having a country rich, *i. e.* industrially developed, yet governed autocratically; a people rich, yet illiterate and ignorant; a land of capitalistic enterprises, yet without personal freedom or initiative and under minute regulations of a paternal government. The government in recent years has failed in everything except in ruining the country. Russian capitalism was not strong enough to alleviate substantially the burden of militarism, because capital was too seriously bled and hampered by an irresponsible autocratic bureaucracy. The burden had to be borne by the people, which under the weight of this bureaucracy was rapidly growing destitute. Famine became chronic, the population degenerated. A special commission was appointed by the czar, November 16, 1901, to report on the destitution of Russia. Here are some figures from the reports of the commission. In the years 1874-83 the percentage of young men not physically fit for enlistment in the army was 13.1; in 1884-93, 17.4; in 1894-1904, 18.5. In the fifty provinces of European Russia the percentage

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of farms that had no horses in 1882 was 26.9; in 1888-1891, 27.8; in 1893-96, 32.2. The percentage of farms that had three or more horses in 1888-91 was 21.7; in 1893-96, 17.5. The same rapid economic decline is visible in the statistics of domestic animals in Russia: on each 1000 farms there were in 1870, 9,329 head; in 1880, 8,345; in 1890, 7,294; and finally in 1900, 6,474.[1]

The growing poverty of the peasants drove increasing numbers from the fields into factories or into city occupations. Here new worlds were opened to them, in which the labor agitator served as interpreter and guide. In the cities the peasants soon became "class-conscious"; they became sometimes trade-unionists, sometimes socialists, but invariably antagonistic to the autocratic régime. As such large numbers became involved in the labor movement, it was out of the question to arrest them all, or exile them all, and his majesty's government invented a procedure for which the Russian revolutionists will never cease to be grateful. To free the cities from agitators, the government sent these agitators in large numbers back to their home villages. Where the revolutionists of the upper classes had failed, *viz.* in propaganda among the peasantry, the government helped them generously by sending tested agitators, factory hands from the peasant class, to disseminate revolutionary ideas among their own kind.

Everybody that was not blind could see that the Russian internal situation was getting more serious every day, and that only very broad and liberal reforms could stay the storm of disaffection. But the czar's government did not choose to consider the internal situation as serious.

Nor did the government choose to consider seriously the demands of the Japanese; and Russia was plunged into an unfortunate war. It is said that one of the strong arguments of the war party in his majesty's council was that war would clear up the Russian atmosphere, that it would weaken the opposition and unite all classes of society in patriotism and loyalty to the throne. What profound ignorance of actual Russian social conditions! A war, a test of efficiency, an impartial judgment — to exonerate Russian bureaucracy! A war with Japan, a country unknown to the people; a war precipitated by well-known St. Petersburg adventurers and

[1] Publications of the Commission, vol. i, pp. 33, 211; vol. iii, p. 214.

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Far-Eastern grafters—to stir up popular enthusiasm and wipe out opposition sentiment! The government overlooked the fact that it has been for twenty-five years at war with the people, undermining their loyalty and patriotism; that if by any stretch of imagination it regarded itself as a government for the people, it was not so regarded by the people. His majesty's government could have gathered some interesting information on this point in Russian as well as in foreign literature. See, for instance, what George Brandes in his *Impressions of Russia* tells us about this very subject. He tells us that when he travelled through Russia in 1887 the hostility between Russia and Germany was reaching its height, and the feeling was prevalent that a conflict might be expected at any moment. And he tells us:

> What was significant for Russia was the almost universal wish for defeat. The foreigner heard this not only in northern, but in southern Russia, and it made no difference whether the speakers were Russians from the East or the West, provided only they were able men who loved freedom. I have certainly heard the wish expressed, as if by common consent, by more than fifty Russians, of the most varied classes of society and entirely unacquainted with each other, that there should be a decisive defeat in an ensuing war. We can scarcely imagine a more instructive symptom than what I have here stated of the deep despair which exists as to the present conditions of the country. No other possibility of liberation from the predominant misery presents itself than that which is offered in the weakness which an unsuccessful war will entail on the ruling system.[1]

This view is confirmed by the testimony of Ivan Aksacoff. Aksacoff was a great Russian patriot and nationalist, the father of the Slavophil doctrine and the leader of the Russian Panslavists of former days. Nobody could doubt the loyalty and patriotism of Ivan Aksacoff;[2] yet this very patriot wrote, after the fall of Sebastopol:

> How severely just is fate, how terrible in its logic! Not by some chance did Sebastopol fall. It fell because it had to fall. It was God's will

[1] Brandes, Impressions of Russia, translated by S. C. Eastman, London, 1889, p. 108.

[2] Concerning Aksacoff, see Samson-Himmelstierna, Russia under Alexander III, translated by J. Morrison, London, 1893, pp. 133-181.

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and God's work, and it shows the thorough rottenness of our system of government and of its suffocating fundamental principles.[1]

Another famous nationalist and statesman, A. I. Kosheleff, set forth in his memoirs practically the same view, and bears testimony not only for himself but for his associates. Kosheleff's social circle included Russia's best families, to one of which he himself belonged, and he tells us: "We all were convinced that the defeat of Russia is more useful to her than her *status quo*."[2] A similar attitude is very general at present. Of course only the extreme radicals positively desired their country's defeat, but others accepted it as the inevitable result of bureaucratic maladministration, and almost all see, in the Russian reverses in the Far East, defeats of the government and not of the people, defeats that carry in themselves far brighter possibilities for Russia's future than could any victories of the Russian arms.

The war has consolidated the Russian opposition forces, the defeats have made revolutionists of the mildest liberals, even of reactionaries. The men and women who have sent their sons to die on the battlefields of Manchuria can not but take a profound interest in the causes of the war and in the way affairs have been managed during the war. The total incompetence of the government and its dangerous, adventurous character have become more evident every day; and patriots throughout Russia feel the absolute necessity of saving the nation from its government. Every day that the war continues brings new burdens, new causes for dissatisfaction, new curses upon the head of the government; while on the other hand the conclusion of a peace without honor and the return of a dissatisfied army to European Russia will be sure to swell the ranks of the revolution. The revolutionary movement at home might perhaps have been kept in check, if the government had dared to use radical measures of repression. But the experiences of a Sipyagin, Plehve and Bobrikoff did not encourage the adoption of such a course. The government had to be lenient, and this involuntary leniency was utilized by the Russian press to the limit. By substituting the word "bureau-

[1] Barsukoff, Pogodin's Life and Letters, vol. xiv, p. 89.
[2] Kosheleff, Zapiski, Berlin, 1884, p. 81.

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cracy" for "autocracy" the Russian system of government has been daily attacked, and with startling frankness.

So, for instance, Prince E. N. Trubetskoy, a leader of the right wing of the South-Russian liberals, has published an article, in which we are told:

> It is neither our army nor our navy that has suffered defeats. The defeats were those of the Russian bureaucracy . . . The bureaucracy has been searching for an enemy; but it did not notice the foreign enemy, because its attention had been diverted into another channel; it was constantly haunted by the ghost of an internal enemy. It saw its enemy in every man not created in its own likeness; it found treason in every man who placed the dictates of his own conscience above the commands of the bureaucracy. It silenced everyone who would have raised a warning voice in time — who would have told the truth to the throne. And now we are reaping where we have sown. It is time, at last, that we should take account of the dangers which threaten us if we do not wish to be taken again unawares. Our bureaucracy, with its principle, *divide et impera*, constitutes a danger not only to our exterior relations but also to our inner life. . .[1]

For making such a public statement Prince E. N. Trubetskoy was called a "traitor" by the *Moskovskia Vedomosti*. This journal, formerly conducted by Katkoff, who was for decades the exponent and eulogist of reaction, is now the sole defender of the present régime. It further described Prince E. N. Trubetskoy as an "ally of the Japs," and expressed its hope that the government might find another Rozhdestvenski who would annihilate the Japanese allies within Russia as the admiral annihilated the allies of Japan on the Dogger-Bank. This attack was answered by Prince E. N. Trubetskoy's brother, Prince Sergius Trubetskoy, a famous professor of the Moscow University, who in his reply did not mince matters. He plainly told the Russian public that for almost a quarter of a century political adventurers and scamps had been exploiting and undermining Russian patriotism; that they had propagated successfully the systematic negation of justice; that they had replaced law and authority by arbitrariness and by an autocracy of obscurants (*kromeshnikov*); that a quarter of a

[1] *Pravo*, 1904, no. 39.

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century of organized and systematic espionage, of systematic abuse of Russian society, could not go by without a trace; that it had, in fact, produced in human hearts feelings of hatred and of wrath.[1]

Such statements have become common in the Russian press. Even the *Novoye Vremya*, a paper which nobody suspects of having any political principles, has fallen in with the general tone. Especially remarkable in this respect are the articles of M. Menshikoff. In one of them he points out that Russia is disliked by all civilized nations on account of its oriental autocratic régime, while on the other hand Japan has the sympathies of Western Europe and America, because it is regarded as belonging to the family of civilized nations. Menshikoff comes practically to the conclusion that the civilized nations are right in excluding Russia from the *tota Christianitas* and placing it with the *terræ barbarorum*. For not only has Russia itself fallen behind in the progress of civilization, but for half a century Russia endeavored to stop the progress of Western Europe, by serving as the main stronghold of West-European reaction. And what has been the result of the oriental régime of Russia, taken apart from the dislike of all civilized nations? The natural resources are exhausted, the forests cut down, the fields sterile; the noblemen are ruined, the peasants run to cold Siberia, leaving behind them a trail of corpses. The race of domestic animals has degenerated; famine has become permanent; cholera, starvation, typhoid and syphilis are decimating the population. Mortality is growing, reaching the figure of 40 to the thousand, while in Western Europe the figure is reduced to 16 or even to 13. And yet the Russian people belong to the same noble race as the nations of Western Europe, and Russia is bound to develop the same type of civilization as soon as it frees itself from the powers of darkness.[2]

Official Russia, another issue of the same paper tells us, tries to assure the whole world that the laws of nature are not written for Russia; that what would kill a German is good for a Russian; that all is well in Russia. But the truth is not kept from foreigners. England, America, France, Japan, *etc.*, have all sent excellent

[1] *Russkia Vedomosti*, 1904, no. 292.
[2] *Novoye Vremya*, no. 10,284, October 30, 1904.

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cultured men to investigate Russia. They know Russia's defects, know its sad "unpreparedness"; Russia only is deceived, and it deceives itself.

A day or two ago I was shown a hard, black piece of mud; it was a piece of bread from the Krestetski district. This bread was made of bark mixed with bran, the like of which is perhaps given to pigs in Western Europe. I looked at this bread and thought: this bread is from the devil. Would the Father give this black stone to His children, who pray for bread? This bread is from the devil, from the source of darkness and of fear, from disbelief in the everlasting law of life, from disbelief in freedom.[1]

The other papers have taken an even more radical tone. *Nasha Shizn* and *Russkia Viedomosti* have demanded, in plain and outspoken words, a constitution and legal safeguards against administrative despotism. Almost all the papers have hinted that official graft is responsible for Russian defeats.

The meeting of the Russian zemstvo presidents and the demands formulated by them constitute an epoch in Russian history. The meeting proved, first of all, that the bulk of Russia's landed aristocracy, so far as it is not identified with graft and the bureaucracy, is on the side of the revolution. The assembly was fully representative of what is best, most honorable, most influential, most educated in Russia. The resolutions adopted were signed by names so respected in Russia as those of Shipoff, Petrunkevitch, Prince Lvoff, Baron Stuart, Baron Budberg, Professor Karisheff, Prince Dolgorukoff, Stakhovitch, Count Heyden, Prince N. S. Volkonski, Novossiltsoff, Professor Kuzmin-Karavayeff, Prince M. V. Golicin, Prince D. T. Shakhovskoy, *etc.* The zemstvo presidents pointed out the abnormal state of things in the empire, the abyss that separates the people from the government, the personal caprice and arbitrariness which characterize all the actions of Russian officialdom, and the utter lack of legality. They therefore demanded a bill of rights and a constitutional form of government. Articles 10 and 11 of the resolutions read as follows:

But in order to create and preserve forever a close and vital union and association of the government with the people on the basis of the

[1] *Novoye Vremya*, no. 10,263, October 9, 1904.

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aforesaid principles, and in order to secure satisfactory development of state and society, it is absolutely indispensable that representatives of the people, in the form of a special elective institution, should take a proper part in making legislation effective, in passing the state budget of revenue and expenditure, and in controlling the legal action of the administration.

In view of the importance and difficulty of the present internal and external situation, the conference expresses the hope that the supreme authority will call together freely chosen representatives of the nation in order to have their coöperation in starting our fatherland on a new path of national development, in the spirit of the priciples of justice, right and mutual assistance between the government and the people.

In addition to these resolutions the zemstvo presidents sent in a special protocol, urging the repeal of the ordinance of August 26, 1881 (which gives special arbitrary powers to administrative officers) and pointing out the necessity of liberating all persons who are suffering administratively inflicted punishments.

Thus the chosen representatives and presidents of the Russian zemstvos indorsed, in letter as well as in spirit, the demands of the Russian revolution and thereby joined its ranks. In passing these resolutions the zemstvo presidents made themselves, according to the Russian law, political criminals, liable to be punished by exile to Siberia. The resolutions, however, were accepted by the secretary of interior and were presented to his majesty.

The action of the zemstvo presidents was a signal. It revealed to the revolutionary forces their own strength. All social forces that had no perfected secret organizations and that desired to make common cause with the revolution registered this decision of theirs publicly. So on December 5, at a banquet, 485 engineers and captains of industry indorsed in the strongest possible terms the demand for a constitution, as the most essential condition of Russia's industrial progress. In the speeches of the evening the necessity for an active struggle with autocracy, a struggle to a finish, was pointed out. Sozonoff and Sikorski, the murderers of Plehve, were characterized as heroes of the great struggle with autocracy, and in their honor all present rose from their seats. And who were those present? Young students or "nihilists"? Far from it. Fifteen were generals, scores were owners, presi-

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dents or directors of the largest industrial undertakings in the empire, and the rest were reputable engineers.[1] Similar action was taken by other representative bodies of Russian citizens. Notable were the resolutions adopted by 400 members of the St. Petersburg bar at a meeting held in the town-hall[2]; by 112 professors of the University of Moscow[3]; by a meeting of 676 St. Petersburg *littérateurs*[4]; by faculties of different universities[5]; by the city council of Moscow; and by the zemstvo meetings of the provinces of Yaroslavl, Poltava, Vyatka, Moscow, Orel, Kaluga, Tshernigoff, *etc.*

How was this agitation met by his imperial majesty? What happened behind the scenes nobody knows. The French paper *Matin*, which is peculiarly well informed on all such matters, tells us in its issue of December 21 that a special cabinet meeting was held in Tsarskoye Selo on December 2 (15) to determine the policy of the administration in regard to the demand of the people. Prince Sviatopolk-Mirski proposed enlarging the council of the empire, now consisting of superannuated ex-cabinet-members, ex-governor-generals and grand dukes, by admitting to this body some elected members of the zemstvos; a measure which could scarcely satisfy the people. But his majesty was not even inclined to grant as much as that. He sided with Muravioff, the secretary of justice, and Pobiedonosceff. Muravioff's argument, according to the *Matin*, was the old argument of Katkoff and Leontyeff: "The Russian czar by his authority and according to the fundamental laws of the empire has the right to do everything except to limit his authority; an autocrat cannot cease to be an autocrat;" *etc.*[6] The same argument was used by Pobiedonosceff, who in addition pointed out that the czar is also the head of the church; that he not only has to be guided by political considerations but has also to consider the interests of the church; and that these interests are bound to suffer from any limitation of the absolute autocratic power of its head. Not only will the church suffer,

[1] *Osvobozhdenie*, no. 62, p. 214.
[2] *New York Herald*, December 8, 1904.
[3] *Bulletin d'Osvobojdenie*, no. 18.
[4] *Bulletin d'Osvobojdenie*, no. 19.
[5] *Ibid*, no. 20, and *Osvobozhdenie* no. 62, p. 204.
[6] Leontyeff, Vostok, Rossia i Slavyanstvo, Moscow, 1885, vol. ii, p. 164.

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but also religion. The Russian people will then fall into sin and revert to barbarism. And limitation of autocracy is also the infringement of a divine law, because the czar as head of the church and autocrat holds these offices by the grace of God, and there is no justification and no excuse for not safeguarding what was given to the czar by God and has been inherited by him from his forefathers.

The czar nevertheless was obliged to make concessions to Sviatopolk-Mirski — concessions regarding the general juridical situation of the peasantry, the local municipalities, the labor question and sundry other questions — but he decided to make no concessions whatsoever that would involve any limitation of his autocratic powers and prerogatives. Moreover, he showed personal ill-will and lack of appreciation of the gravity of the situation.

Early in December, Prince P. N. Trubetskoy, the marshal of the nobility of the province of Moscow, had a frank talk with his majesty, and told him that he had come to the conclusion that "*ce n'est pas une émeute, mais une révolution.*" [1] His majesty has been told the same thing a great number of times during the last three years by some of his most loyal subjects and by his ablest statesmen. Nevertheless he chose to snub and deliberately challenge the most moderate and peaceful elements of the revolutionary movement.

On December 20 the czar received a petition of the Tshernigoff provincial zemstvo, begging him to convoke freely elected representatives of the zemstvos, and to command them to draw up independently and freely a project of reform which would answer the well-known needs of the Russian population. His majesty's answer, as officially announced, consisted of the following remark written on the petition in his own handwriting: "I consider the action of the president to be arrogant and tactless. Questions of state administration are of no concern to the zemstvos, whose function and rights are clearly defined by law."

Little hope was left after this for a peaceful solution of the grave situation; but whatever hope lingered in the hearts of certain mild

[1] Letter of Prince Trubetskoy to Prince Mirski, December 15, *Osvobozhdenie*, no. 62, p. 216.

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liberals vanished after the long expected manifesto of the emperor was published on December 26.

To begin with, this manifesto was accompanied by a very curious official document, legally utterly invalid. It may have been meant to be either an imperial ukase or a ministerial ordinance, but since no signature was attached to it, it was neither. It was an anonymous governmental threat. It explained that all the demands and petitions for legality and a constitution were "inadmissible in the face of the sacred foundations of the laws of the empire and the indestructible elements which form the government." All meetings of an anti-governmental character were therefore ordered stopped. Presidents of zemstvos, city councils, institutions and societies were furthermore warned of their liability if they should allow the corporations over which they presided to discuss questions of government. The newspapers were also ordered to produce "the necessary calming effect on public life, which has deviated in recent times from its proper course."

As to the signed imperial manifesto, it is practically drawn up on the lines of the manifesto which was edited by Plehve and which, like so many manifestos of his imperial majesty, has remained a dead letter. It begins with the assertion of undeviating maintenance of the autocratic régime, which is the point at issue and the only point of interest to the Russian people. The promises of the czar regarding reforms are couched in language so abstruse and vague, that they may be construed as meaning something or nothing, as future circumstances may demand.

After declaring the undeviating maintenance of autocracy, the manifesto promises to give special attention to the peasantry. The other reforms, or rather promises of reform, are set forth under eight heads and are in substance as follows:

1. Adoption of legal measures against arbitrary acts of officials.
2. Widening of the scope of the local work of the zemstvos.
3. Independence of the courts.
4. Protection of labor and attention to the question of the introduction of state insurance for workingmen.
5. Revision of so-called exceptional laws and limitation of the discretionary power of administrative officers.
6. Protection of the fundamental law of the empire establishing religious tolerance.

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7. Legislation to limit the rights of foreigners in Russia.
8. The removal of unnecessary restrictions on the press.

All these promises, so far as they are of any political significance, are utterly incompatible with an autocratic régime. For instance, the promised measures for safeguarding the existing law, for securing the independence of the courts and for limiting the discretionary power of administrative authorities, are, in a despotic régime, simply meaningless words. Similar laws were passed by Alexander II, and these amounted to nothing, because there was no guarantee that they would not be repealed or modified, and because their enforcement was in the hands of a corrupt bureaucratic hierarchy.

Even the motives set forth in the manifesto prove how meaningless the whole document is. Article 5 reads: "That there should be a revision of the exceptional laws which were decreed at the time of an unparalleled outbreak of criminal activity on the part of enemies of public order, and the application of which was attended by a grave extension of the discretionary power of the administrative authorities." Now it was probably known to his majesty that, so far as "criminal activity on the part of the enemies of public order" is concerned, no period of Russian history can compare with the present day. Suffering particularly from the arbitrary power of the highest administrative authorities, who represent the arbitrary power of the czar, his majesty's subjects have indicated their resentment by killing two successive secretaries of the interior; and the bomb that killed von Plehve was publicly characterized by a leader of the St. Petersburg bar as filled with tears and blood from all Russia. But it is obvious that the arbitrary power of the czar's secretaries and their subordinates can not be limited without limiting the source of all arbitrary power.

Article 6 repeats the provisions of the imperial manifesto of February 26, 1903, about tolerance in matters of faith. The period between February, 1903, and December, 1904, was characterized by particularly cruel persecution of heterodox and non-Christian bodies, such as the Armenians, the Stundists and the Jews.

Article 7, announcing the expulsion of foreigners, so far as their presence is not manifestly needed by the state, is scarcely a measure which is likely to be helpful to the industrial development of Russia.

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Article 8 promises to remove all "unnecessary restrictions" of the press, and to place printed speech within clearly defined legal limits. It remains to be seen what restrictions will be regarded as "necessary," and how much free scope the legal limits will leave to the press.

This manifesto, which perhaps would have pacified the public a year ago, excited profound indignation throughout Russia. It was characterized by a well-known St. Petersburg professor at a public meeting as "arrogant and tactless." It must not be forgotten that it was published just at the time when Port Arthur was about to surrender to Nogi, when the remnants of the fleet in the Far East were being wiped out, when two hundred and forty-nine districts of European Russia had already been mobilized, and when Russian industry was almost paralyzed by the war. Under these conditions, the manifesto altogether missed its object. The reactionary bureaucratic press alone was glad. Inspired by the government, it waged war against the idea of parliament. The bureaucracy and its two organs, the *Grashdanin* and the *Moskovskia Vedomosti*, maintained that a parliament would stand like a stone wall between the sovereign and the people, while now their relations are those of close intimacy and mutual confidence and affection. The demands for guarantees of life and liberty were not recognized by the bureaucracy as popular demands, but were regarded as caprices of intellectual malcontents. It rested with the common people to show that this was not the case. And the great political strike took place.

The story of this strike is well known, and it is not necessary to rehearse it here. There was no violence on the part of the workingmen. It was, according to eye-witnesses, a most orderly, and well-behaved crowd, desirous only to petition his majesty for political rights. The petitioners, it has been officially admitted, were not armed. They came with their women, their children and their indigent parents. They came to tell their sovereign that they were human beings and that their endurance had its limits. They came to ask him for protection. They came to beg him to rescue them, to give them the means of working out their own salvation, to free them, to allow them to share in the government of the country. The czar had an opportunity to show the world what

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sort of a man he really is. The humble petitioners, their wives and their children, were met with volley after volley of lead from rifles and machine-guns; they were pursued in their flight by Cossacks. Quiet has been restored at St. Petersburg, and is being restored in the same fashion in other Russian cities.

It is claimed, on behalf of the Russian government, that the gathering of the workingmen was unlawful, and that the people of St. Petersburg had been especially warned to remain in their houses. But in Russia so many things are unlawful, and so many unlawful things are done daily with impunity, that the laws have fallen into contempt. And the people were not warned and had no reason to expect that such an assembly of Russians would be met by the Russian government like foreign enemies arrayed for instant battle. In other countries gatherings of a really dangerous character, riotous mobs recruited from the dregs of a metropolitan population, are scattered, after due notice, with no greater damage than a few bruised shoulders and broken scalps. After meeting a body of laborers led by a priest with such insensate and indiscriminate butchery, after refusing quarter to men, women and children, his majesty's government must naturally be prepared to take the consequences of its action. The day after the massacre all the leading St. Petersburg men of letters issued the following declaration:

> The public should understand that the government has declared war on the entire Russian people. There is no further doubt on this point. The government which is unable to hold intercourse with the people except with the assistance of sabres and rifles is self-condemned. We summon all the vital energies of Russian society to the assistance of the workingmen, who began the struggle for the common cause of the whole people. Let shame overwhelm the names of those who in these days of great and fateful struggle oppose the people and join the ranks of their hangmen.

As to the revolutionists, whose number is growing daily, they demand in their proclamations the death of the czar and the grand dukes.

His majesty's government seems to be fully aware of the dangers confronting it. We are told that the czar is ready to make some

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further concessions to pacify the public. He has also appointed an insignificant but very much hated police official, Trepoff, to serve as governor-general and incidentally as lightning-conductor, if it prove necessary to divert popular vengeance from the throne.

The climax is not yet reached, but it will probably be reached soon. His majesty's government faces an unpleasant dilemma. If it continues the war, it will increase the general dissatisfaction; if it mobilizes more districts, it will revolutionize them. If, on the other hand, it asks for peace, it will have on its hands at home a defeated army, which has suffered much from graft and maladministration. The officers and the men of this unfortunate army are as little likely to strengthen the cause of autocracy at home as autocracy is likely to strengthen Russia's prestige abroad.

VLADIMIR G. SIMKHOVITCH.

GREENWICH HOUSE, NEW YORK CITY.
FEBRUARY, 1905.

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REVIEWS

Mass and Class : A Survey of Social Divisions. By W. J. GHENT. London, The Macmillan Company, 1904. — 256 pp.

It is the peculiar boast of our fellow-countrymen that the institutions of the United States permit of no classes; that all men are born free and equal; that we tolerate no title of nobility, and that the highest offices in the state are open to every American. True undoubtedly it is that we have no castes as in India, no aristocracy as in Great Britain; but that there are classes, separated by traditions, conditions and instincts as unalterably and perhaps more dangerously than in the Far East, Mr. Ghent has rendered us a service in demonstrating. And these classes are not distinguished only by obvious differences of wealth; for although the skilled workman may enjoy a larger income than the small tradesman, he belongs to a different class (p. 75), is animated by different instincts and is governed by a different code of conduct. The author distinguishes six classes: the wage-earning producers (p. 77); the self-employing producers (farmers and handicraftsmen, pp. 79, 81); social servants (teachers, clergymen, physicians, artists, writers, *etc.*, p. 82); traders (p. 83); idle capitalists (p. 84); retainers (lawyers, clerks, domestic servants and politicians), characterized by direct dependence on traders and capitalists (p. 85); but in the three most interesting chapters in the book entitled "Class Ethics," "Ethics of the Producers" and "Ethics of the Traders," he points out that from the ethical point of view these six classes may be reduced to two: the group that has solidarity for its watchword, and the group that on the contrary is pledged to the doctrine of individualism. The first of these groups has two standards: the individual standard of work, under which no man is entitled to wages who does not earn them, and the collective standard of fellowship, under which an injury to one becomes the concern of all (pp. 114 *et seq.*). The second of these groups has one standard: freedom — freedom to contract, freedom to labor, freedom to do what one wills with one's own (pp. 140 *et seq.*), proceeding upon the theory that the largest amount of social service can be secured by giving to every individual the largest motive for contributing to it. These two ethical systems are tested in their respective results, and the situation is summed up in the suggestive phrase: "It is the social-minded mass arraying itself against the unsocial-minded classes" (p. 245).

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The book is tinged with the irony that characterized Mr. Ghent's previous work, *Our Benevolent Feudalism*, and with the temper that enlivens all the writings of the Marxian socialists, to which party Mr. Ghent uncompromisingly belongs; but even to those who differ most with Karl Marx it will have value for the demonstration it incidentally furnishes not only that man is and must always be the product of his environment, but that he is in great part master of the environment and can by virtue of this masterdom determine the lines of his own progress, or by neglecting it constitute himself the prime factor in his own decay. As such it will constitute interesting reading to all students of sociology.

PARIS, FRANCE. EDMOND KELLY.

The Theory of Business Enterprise. By THORSTEIN VEBLEN. New York, Charles Scribner's Sons, 1904. — 400 pp.

The reader of this work is likely to be reminded of what Socrates said of the work of Heraclitus the obscure, *viz.* that "what he understood of it was excellent, and he had no doubt that what he did not understand was equally good; but the book required an expert swimmer." After studying this book off and on for several weeks, the reviewer confesses with humiliation that in a considerable part of it he cannot tell what the author is driving at; but this is not necessarily the fault of the book. The following has been adopted as a working hypothesis as to the author's meaning, but the reviewer is not entirely sure that the real meaning may not be exactly the opposite.

The machine process and investment for profit are the two most salient features of the present economic situation. The large business man, who dominates these features, is therefore the central controlling factor, not only in business but in our whole social system. "The large business man controls the exigencies of life under which the community lives. Hence upon him and his fortunes centres the abiding interest of civilized mankind" (p. 3). Therefore in order to understand the modern economic world, it is only necessary to understand the large business man and his work, which is called business enterprise—at least it is more essential to understand him than any other single factor. The large business man is often something of a humbug, because his work is frequently acquisitive rather than productive, and in such case the community would be better off without him. This is no mere "flower in the crannied wall" theory, for the author definitely implies that business enterprise dominates our economic life, our conceptions of general welfare, our moral standards and even our cultural aims and

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intellectual processes. The work before us is, therefore, in one sense, an examination of the large business man with a view to discovering and explaining his habits, and the reasons, both subjective and objective, conventional and rational, for his behavior.

This seems like a cross between the great-man theory and the economic interpretation of history after the order of Marx and Loria, though the first named parent seems to have possessed a trifle more prepotency than the last named. Whether great men are really the makers of history or merely, as Hamlet said of the players, "the abstract and brief chronicles of the time," they will in either case well repay study. Similarly, such a study as the author has made of the large business man will prove enlightening whether he be really the controller of the economic situation or only the product and epitome of it. But we must protest against the assumption that the large business man rather than the large politician to whom he pays tribute, the large editor whom he must placate, the large labor leader with whom he must seek an alliance, or any one of a dozen other large personages, is the dominating force in the present world.

The editor who in one breath descants upon the "power of the press," and in the other excuses himself for publishing the kind of stuff he does on the ground that he *must* publish what the public demands, is not more inconsistent than the business man who descants upon the "power of business" at one time, and at another excuses himself for paying starvation wages on the ground that business is subject to general economic laws. The fable of the gnat who sat upon the hub of a moving chariot and fancied that he was swinging the whole world around himself, does not greatly exaggerate the case of the individual who, or the class which, pretends to dominate the world.

In business enterprise more than in almost any other field of endeavor, success depends upon adaptation. It is said of a great merchant prince of a former generation that his first business enterprise was a failure because he tried to persuade the people to buy something which they did not want. His second was a success because he first took the precaution to find out what the people wanted, and then supplied it. By strict adherence to the latter policy during the rest of his life, he built up an immense fortune. Such a man could not be said to dominate the economic world to any great degree, and yet all successful business enterprise is fundamentally like his. It is not denied that a man or a group of men may, within narrow limits, move the world, but their influence upon the world is insignificant as compared with the influence of the world upon them.

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The author's contention that the large business man is primarily an acquirer, and only incidentally a producer of wealth, is undoubtedly correct. The large business man, like the professional man and the laborer, is primarily interested in acquiring wealth. If he can acquire wealth only by producing it, that is because of the perfection of the machinery of social control and not because of any benevolence on his part. Unfortunately the machinery of social control is far from perfect.

In the foregoing criticisms it is not intended to question in any way the value of such a study as that which Professor Veblen has made. We have had studies of the labor movement, of the leisure class, and of various specific industries. No one need insist that any one of these is a dominating factor in order to prove that such studies are valuable. This study of business enterprise is therefore heartily commended to those who are willing to do some decidedly hard reading in a new field and on an original and suggestive treatise.

T. N. CARVER.

HARVARD UNIVERSITY.

Eisen- und Stahlindustrie. VON DR. OSKAR STILLICH. National-ökonomische Forschungen auf dem Gebiete der grossindustriellen Unternehmung. Band I. Berlin, Franz Siemenroth, 1904. — xii, 238 pp.

A new department of economics has lately separated itself from the mass of studies which have succeeded the old simple deductive political economy, and even sometimes finds a place in university curricula as "descriptive economics." It borrows from theory enough to serve as a guide through the tangled maze of facts which make up modern industry, it is indebted to history for light as to the development of the present out of the past, and it takes from statistics figures to prove the effects of interior and exterior forces upon trade. It may base itself upon technics and trace the effects of improvements in processes and methods on trade, labor and output, or it may recount the technical, commercial and financial development of typical businesses in an industry so as to show forth the general progress and condition of the whole trade. The latter is the course adopted by Dr. Stillich in dealing with the iron and steel industries of Germany, and he proposes to follow the present work with volumes on other branches of industry and transport. Taking five of the most prominent iron works of Westphalia, Hanover and Upper Silesia—Luxemburg and Lorraine being unfortunately omitted—he has compiled his narrative from prospectuses, business reports, memorials prepared for exhibitions and anniversaries, and similar documents,

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supplementing these studies by personal enquiries. Needless to say he found great difficulties in his task, for business men are generally unwilling to disclose particulars which they fear may help their business rivals, and very often have only the vaguest ideas of general trade policy or of their relation to the trade by which they live. "Our aim is to make money," said one man; "Our business is to produce," said another—admirable sentiments doubtless, but not particularly illuminative to the economist.

From Dr. Stillich's pages we learn that the two great revolutionary inventions of the nineteenth century affected Germany very differently. The Bessemer process gave England a great advantage, for the black-band ores of Westphalia were soon exhausted and none of the works were favourably situated for the importation of hematite. The Thomas Gilchrist process, on the other hand, virtually created the modern iron industry of Germany, whose manganiferous ores, high in phosphorus, were admirably suited to make pig-iron for the basic convertors. The Franco-German war shifted the centre of the iron trade from Westphalia to Luxemburg and Lorraine, which now produce more than three-fourths of all the iron ore in Germany. Fuel forms one of the most serious problems for the German iron-masters, for the coal is generally poor in coking qualities, and it is only the cheapness of the phosphoric ores—its ore costs the *Ilsederhütte* of Hanover only 2.6 marks per ton—which keeps the iron industry alive. Great as has been the progress, both scientifically and commercially, of Germany in the production of iron and steel, the tale is not one of uninterrupted prosperity. The *Hoerder Bergwerks- und Hütteverein*, one of the principal companies in Westphalia, paid no dividends for sixteen years in the period 1874–75—1894–95, and the capital losses of the famous *Dortmunder Union* since its foundation in 1872 amount to 73,050,000 marks. "Dumping" abroad was tried as a relief from depression in the seventies, the formation of cartells dates from the bad times of the eighties, while for about a quarter of a century a highly protective tariff has been in force. None of these devices has saved the German iron industry from the crises of 1873–79, 1883–87, 1890–94, and 1900–03, and the last has been perhaps the severest of all.

Dr. Stillich illustrates this general history from the particular course of the five great companies he describes in his book, and he shows also the way in which they were affected by business management, financial policy, scientific equipment, the location of the works, and their suitability for efficient organization. The benevolent institutions established by the masters to bind their workpeople to them also claim a good deal of his attention. It would take too much space to deal here with all these

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factors; the student must go to the book itself. Dr. Stillich does not claim to write a history of German industrial development, but rather a commentary thereon, and his individual treatment makes more vivid those forces whose reality one is apt to lose in a more comprehensive but more general work. He has done wonders with imperfect material, and his book may not only be esteemed a success but may be taken as a model. There is plenty of room for similar books dealing with American and British industries, and one can only hope that he will have plenty of imitators.

HENRY W. MACROSTY.

LONDON, ENGLAND.

Modern Tariff History: Germany, United States, France. By PERCY ASHLEY, M. A. With a preface by the RT. HON. R. B. HALDANE, M.P. London, Murray, 1904. — xxiii, 358 pp.

The fiscal discussion in Great Britain has been productive of much shoddy stuff under the guise of economics, but it has also been the cause of some few books of permanent value. Among these latter must certainly be numbered the one now under consideration. The author, not professing much original research, has based this volume on lectures delivered at the London School of Economics. He has attempted "to provide students with a brief and, so far as possible, unpartisan sketch of the development of tariff policy in those states which are most frequently compared with the United Kingdom, and of the forces, political and economic, which have determined that development." Mr. Haldane in his preface comments on this analysis from the free-trade standpoint, and concludes that while Great Britain must hold fast to her present policy there is still much to be done for the expansion of her trade and for the maintenance of the unity of the British Empire. The former depends on improving the quality of her goods, the latter is to be secured by the avoidance of anything which restricts the complete freedom of all parts of the British dominions.

In Germany political motives have always been closely intertwined with economic policy. German industry was hampered by the separate tariff systems of about sixty states, and the independence of these states was an obstacle to German unity. External protection was the price of internal freedom, and on this basis the *Zollverein* was established in 1834. The growth of protection was justified by List's theory that protection was necessary to enable a state to ascend from the agricultural to the industrial stage. The application of his doctrine of the development of industrial powers led to conflict between the agriculturists, who were

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free-traders, and the protectionist manufacturers. The political necessity for Prussia of excluding protectionist Austria from Germany played a great part in the free-trade development which continued up to 1877, and a large section of manufacturers who depended on foreign "half-stuff" counterbalanced the protectionist iron-masters and cotton-spinners. After the French war came a period of inflation followed by an industrial crisis everywhere, accentuated in Germany by English dumping of surplus goods; the cheapening of transport exposed the Prussian agriculturists to American competition and made them clamor for protection; at the same time Bismarck required money for imperial expenditure. The protectionist policy was once more taken up, but German foreign trade remained stagnant till the tariff was modified by the Caprivi treaties. Since then under agrarian leadership the customs duties have been made heavier and more complex. As the "infant industry" hypothesis is no longer applicable, economists have modified their explanatory theories to suit the new circumstances. Some wish to retard the industrialization of Germany, others advocate the tariff as a means of extorting concessions, but neither class can point to any conspicuous success to justify their arguments.

From the review of American tariff history one gathers generally that the great development of industry has been quite independent of tariffs. The progress of so vast a continent with such immense resources could scarcely have been retarded by any kind of customs legislation. Secondly, it is seen that when an industry grows up under protection it suffers as soon as it is exposed to free competition, and further coddling is demanded —a point seldom considered by those who advocate the temporary imposition of tariffs for special purposes. Thirdly, the extent to which tariffs have been determined by politics and not at all by economic necessities is brought into prominence. To-day in Britain a customs union is advocated as a means of uniting the British empire; in Mr. Ashley's pages the protective tariff of 1828 appears as a source of dissension, sowing the seeds of enmity between the North and the South which later were to blossom forth in war. The power of the manufacturer to exploit the necessities of the government is well exemplified in the tariffs of the Civil war; the impossibility of fostering one industry except at the expense of another is shown in the history of the wool trade; and the corruption of politics is shown by the bargaining of the different interests in the construction of the later tariffs.

In France protection is the outcome of the desire to save agriculture from American competition, with the natural consequence that compensating sops have to be given to manufactures. Agriculture has been

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saved, but at a cost; the French are "essentially not a business people" and consequently protection has had a dulling influence on the manufacturers: "it has wrought little good and in various ways much harm to industry and commerce." This short summary is but the scrappiest account of a brilliant book, packed with facts, written in a lucid style and imbued throughout with rigid impartiality. The author deserves well alike of politician and student, and his book ought to have a wide circulation. If he succeeds in driving home the two facts—that the policy of every country must be determined by the circumstances of that country and not by reference to the experiences of some other country under quite different circumstances, and that there are other means besides tariffs by which a state can "foster" and "protect" industry—he will have done well. Altogether we must write down Mr. Ashley's *Modern Tariff History* as an indispensable book, and he has enhanced its value by including lists of the chief authorities on each country to which the student can go who has time and inclination to pursue his investigations further.

HENRY W. MACROSTY.

LONDON, ENGLAND.

Trusts of To-day. By GILBERT HOLLAND MONTAGUE. New York, McClure, Phillips & Co., 1904. — xviii, 219 pp.

Few problems of present economic policy have received such painstaking study as that of the control of trusts. As a result, we are possessed of a voluminous trust literature, much of it very valuable, but little of it in such form that the ordinary reader can derive much profit from it. The present need is for more popularizers, rather than for more writers of scientific monographs. Mr. Montague seems to belong primarily to the former class of writers, although his earlier work, *The Rise and Progress of the Standard Oil Company*, gave indications of a taste for original research.

There is nothing original in *Trusts of To-day*. Even those whose reading on the subject has not extended beyond Professor Jenks's *Trust Problem* and Professor Meade's *Trust Finance* will find in it few new facts. This does not, of course, impair the value of the book as a popular presentation of the subject. Mr. Montague's style is lucid and his arrangement of matter is excellent. Often, indeed, one wishes to see his generalizations fortified by authority; but this would no doubt have been out of harmony with the general plan of the work.

While much of the book is devoted to the exposition of well-established facts and principles, the author's optimism has in some cases led him

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to take positions with regard to the industrial and social effects of the trust movement which it would be difficult to maintain. A few brief pages of somewhat superficial argument lead to the conclusion that there is only one evil in practical monopoly which is not self-corrective—that of freight discriminations.

If we are to credit Mr. Montague, there is no danger that the trusts will establish exorbitant prices. Organized labor has nothing to fear from them. The reduction of prices of raw materials, often ascribed to the trust, is really due to over-production. Unfair competition, such as local price cutting and the factor's agreement, of which we have recently heard so much, are well-recognized business practices; therefore there is nothing bad in them. As for the elimination of the jobber, the discharge of travelling salesmen, and the like, these are only incidents of progress, as justifiable as any other labor-saving arrangements.

It is perhaps superfluous to treat such a position seriously. Prices may not have advanced since the formation of the trusts—on this point, however, there is some dispute—but since most of the industries in which trusts have been formed are in a dynamic state we should have expected prices to fall. Possibly the price of oil has fallen since the formation of the oil trust—but should it not have fallen more than it has? Organized labor may have been well treated in the few years of trust formation. Any other policy would have been insane, in view of the excited state of public feeling. But what light does this fact throw on the future policy of the trust, when it shall have the position of a long-established institution? As to price discriminations, it may be quite true that they existed under conditions of competition, and that under such conditions no great evil resulted from them. Conditions have changed, and price discriminations must be judged from a changed point of view. Finally, as to the advantages gained by the trust through a reduction of personnel, it would be unsafe to argue that these may be defended by a mere reference to the argument for labor-saving devices under competitive conditions. The gain from the latter was quickly transferred to the consumer through a reduction in price; the gain from the former results merely in increased monopoly profit—quite another matter.

It appears then that Mr. Montague does not give due consideration to the industrial evils of monopoly. He shows, however, a clearer insight into the financial aspect of the problem. His treatment of the evils of over-capitalization and unsound financial policy is clear and in the main scientific. Publicity, as one would expect, is the remedy he proposes for these evils. But it is easier to prescribe publicity than

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to induce the trusts to take the prescription, and consequently his suggestions as to the reform of trust legislation leave a somewhat vague impression. His review of the shortcomings of existing legislation is excellent, but his discussion of the outlook for better legislation is unsatisfactory.

On the whole, then, the book leaves much to be desired. It is to be hoped that it may be followed by other popular works on the subject, equally readable, but written from a somewhat different point of view. The writer on trusts should not be too optimistic to admit that there is some basis for the general view that practical monopoly possesses some very real dangers and that the existence of monopoly changes the aspect of many practices that were quite innocuous under competitive conditions; and he should be sufficiently optimistic to hold that it is possible to devise laws which will, when supplemented by intelligent judicial interpretation, restrain the excesses of monopoly without paralyzing ordinary business.

A. S. JOHNSON.

Recent Literature on Interest: A Supplement to Capital and Interest. By EUGENE V. BÖHM-BAWERK. Translated by WILLIAM A. SCOTT and SIEGMUND FEILBOGEN. New York, The Macmillan Company, 1903. — xliii, 151 pp.

The Nature and Necessity of Interest. By G. CASSEL. London, Macmillan and Company, Ltd., 1903. — xii, 189 pp.

These two books, published almost simultaneously last year, testify to the attention which the theoretical problem of interest still commands. The first is a well-executed translation of the new material embodied in the second German edition (1900) of Böhm-Bawerk's *Geschichte und Kritik der Capitalzinstheorien.* The translators well say in their preface:

> Whatever may be the final verdict of science regarding the agio theory, no one can doubt that the splendid example of criticism and analysis which is contained in Böhm-Bawerk's work has raised theoretical discussion to a higher level and has been a constant and powerful stimulus to investigation in this field.

The preface is largely taken up with the translators' epitome of the criticism of John Rae, to whose ideas the author's attention had been called after the first edition of his work appeared. The translation is made up mostly of somewhat detailed replies to Marshall (a modified abstinence theorist), Carver (an abstinence theorist), and Wieser (a

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productivity theorist), and to various advocates of labor-cost and exploitation theories.

The book has, on the whole, a negative rather than a positive character. To borrow a phrase from recent politics, the author "stands pat" on what he had written fifteen years before. More clearly than before he realizes and frankly confesses that he is an eclectic. He admits (p. 137) that something may be said against eclecticism of every kind, but the objection seems to him least when "incoherent elements of different theories are combined into an external unity." He repeats his familiar condemnation of the productivity theory, declaring (p. 121) that "the solution of the problem of interest can never be found in the process of thought peculiar to that theory." But he here means complete solution, and again and again he repeats his belief that two elements coöperate in the explanation (p. xxxii), that psychological and technical points of view must be harmonized (p. 8), that interest has several sources, including the roundabout process (pp. 45, 46, 143, 145 *et passim*). He contrasts (p. 142) his own partial productivity theory with "the genuine, outspoken productivity theories," which leave out "a full half of the actual causes of the phenomenon of interest." So far from seeking to evade the appearance of eclecticism, he takes pride (p. 146) in the two-fold nature of his explanation, and declares it to be "a recognized truth" that a correct solution must be an eclectic one. We must express an emphatic dissent from this lame and impotent conclusion which, however, completely verifies the opinion of the reviewer as expressed in the *Quarterly Journal of Economics* (vol. xvii, p. 177) that Böhm-Bawerk's theory, "so far as it rests on the productiveness of the roundabout process, is a productivity theory." An eclectic conclusion disappoints the high purposes with which Böhm-Bawerk began his study of the subject, and the high hopes he inspired. His whole discussion goes astray for lack of a consistent conception of capital. He seems at times near to a broader and truer conception of the problem of time-discount, but fails at such points to develop his thought.

The author is entirely untouched by those currents of thought which, beginning with J. B. Clark and Irving Fisher, have developed an entirely new literature of the subject of the capital concept. For lack of such a point of view, most of the subtle controversy of the present volume must appear to many readers to be the echoes of ancient opinions. The argument does not move forward, but merely marks time. The familiar ideas, when reiterated, may still engage the attention of a small group of special students of abstract theory, but they have lost their power to stimulate and inspire.

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Dr. Cassel attempts first to develop a new theory of interest and secondly to examine the causes why interest is and always will be necessary. He presents a theory of interest as the pay for "waiting," and differs with Böhm-Bawerk, to whom he refers slightingly (p. 22), whose review of the history of the subject he criticises as one-sided, and to whose roundabout process he presents essentially the same objections that had been pointed out a year before by the reviewer (in the *Quarterly Journal of Economics*, vol. xvii, pp. 163–180). But Dr. Cassel meets some of the same difficulties that befell Böhm-Bawerk, for he also fails to get a consistent capital concept. He connects the payment for "waiting" with the definite factor capital (p. 67), and then after some delay limits capital to "produced goods except such consumable goods as are already in the hands of the consumer" (p. 88; see also p. 133). He does not see that waiting may be present both in the case of consumable goods in the hands of the consumer and in the case of land (which, in the old-fashioned way, he usually thinks of as not being an object of waiting). He wavers somewhat when (p. 167) he declares that interest is paid not for "the use of a piece of concrete capital . . . but for 'goods in general,'" for land must here also be included. But it is needless to adduce other examples to show that such a limitation of the capital concept makes impossible a complete theory of time-discount.

In the part dealing with the necessity of interest, the book is more original. It discusses at length and suggestively the changes that would be worked in the motives of men if the rate of interest fell from three per cent to two per cent or lower. The shifting of the margin of application of agents is described, and "the main argument of the book" (p. 157), which is to show "the necessity of interest," is strikingly brought out. The argument is strong as directed against the notions of the over-production of capital and the fallacy of saving. By this, its most interesting and valuable feature, the book should be judged as a contribution to economic theory.

FRANK A. FETTER.

CORNELL UNIVERSITY.

L'Intéret du capital. Par ADOLPHE LANDRY. Paris, V. Giard & E. Brière, 1904. — 367 pp.

It is perhaps a necessary result of the present organization of economic teaching in France that fundamental questions of general theory should be largely ignored. So long as economics is taught as a branch of law it must be expected that attention will be directed to the more or less superficial problems of economic organization and administration, to

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the neglect of any really thoroughgoing analysis of the basic facts of the existing social order. The work before us is one of the most significant that recent French economic literature has produced. Aside from its own distinct merit, it is an indication that economic theory is not dead in the land of Turgot, Quesnay and Cournot.

Following the plan of "divide and conquer" the author asks first, why does capital require interest? and second, why does capital obtain interest? This method he gracefully attributes to a suggestion of Mr. F. B. Hawley. In answer to the first question (chapter ii) the author brings in a modified abstinence theory. In this part of his discussion he scores a distinct advance over Böhm-Bawerk by pointing out that not all waiting or abstinence is burdensome, and by bringing in the idea of marginal abstinence. In answer to the second question (chapter iii) the author brings in the productivity theory, again scoring an advance over Böhm-Bawerk. He makes it perfectly clear that the fact of abstinence explains why capital is scarce, and that the fact of the productivity of capital explains why there is a demand for it. Given a demand for the use of capital and an insufficient supply to meet that demand, the ordinary process of valuation will produce interest and determine its rate.

A considerable portion of the book (chapters vi–ix, pp. 166–298) is devoted to a discussion of other authors. Especially to be commended is his treatment of Marx, the shallowness of whose exploitation theory is neatly shown, without showing any of Marx's chief characteristics, *viz.* feline spitefulness alternating with Mephistophelian cynicism. Our author goes even to the opposite extreme, for he is fair to the point of generosity.

One of the most interesting features of the book is the first appendix, wherein the author states that one result of this study of the interest problem has been to cause him to change his mind regarding some of the conclusions set forth in a former work entitled, *L'Utilité sociale de la propriété individuelle.* In that work his conclusions may be classed as socialistic. But, as he says, a deeper study of the phenomena of capital has caused him to modify those conclusions. This appendix will serve to call attention to the undeniable fact that the problem of socialism can only be solved by a study of the theory of interest. Unless the socialist can maintain the Marxian theory of exploitation, or some similar theory, the rational basis of his faith will be cut away, leaving him only a sentimental basis to stand upon. And unless the individualist can find a rational basis for interest, his belief in private capital must likewise rest upon a purely sentimental foundation. Socialism

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can not be combated with the mere statement that "it won't work." If socialism is right and private capital wrong, socialism must "work," and it will "work." The author's willingness to accept the conclusions of his own logic is as rare as it is commendable.

T. N. CARVER.
HARVARD UNIVERSITY.

Business Education and Accountancy. By CHARLES WALDO HASKINS. Edited by FREDERICK A. CLEVELAND. New York, Harper and Brothers, 1904. — xi, 239 pp.

This little book consists of a collection of papers read by Professor Haskins upon various occasions, and of the initial chapters of a work which he was preparing on accountancy. Fragmentary as the work is, it reveals the breadth of view and the practical insight of the author. As the biographical sketch shows, Professor Haskins was a man of good parentage, born into the best social and financial society of the metropolis. He had taken advantage of the best preparation in study and travel, and after years of broad experience he had in a decade developed a neglected line of work to importance comparable with other learned professions. With his large and generous heart he was not only interested in the practice of accountancy but he was enthusiastic for business education that would better prepare men to enter the field and do the profession credit. It is impossible to estimate the great loss to business education caused by his death at the zenith of his powers.

In referring to business training he writes:

> There are two prejudices deeply rooted in the human breast which must be accounted for at the very threshold of the problem of business training. One is the prejudice against business as a calling or profession; the other is the prejudice against education. The prejudice against business as a pursuit has been fostered for untold ages by the traditions of the non-business classes, especially the educated class. The prejudice against education, on the other hand, has been one of the most lively sentiments of the commercial community itself. The present movement of business training is making slow headway against the inertia of a great world-society bound together by hereditary ties, which in their inception and use were intended to resist educational progress. These prejudices, however, are doomed; they are dying, but they die hard.

And again:

> The new so-called higher commercial education movement is intended to bridge over the chasm between study and business—between the scholar,

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the savant, the recluse, if you will, on the one hand, and the sturdy, quick-witted man of action, the handler of the material products of the world, the money-maker, if you will, on the other. It recognizes the utility of education, and seeks to adapt instruction to the exigencies of making a living for society, and it recognizes the utility of practical information, and seeks to render this information available to the student before he shall have been thrown out into the maelstrom of business experience. . . . To meet the demand, then, of the modern business world for an adequate supply of trained business men—now so unfortunately rare—is the object of the present missionary movement in the interest of better facilities for business education.

In the introduction, the editor gives an excellent analysis of the need of business education and its possibilities. He writes:

Let us go to the field of biology or chemistry; here we find thousands of specialists at work on the data of these subjects, bringing them together in such relation that plant life and chemical reaction may be understood. The facts in the field of business are just as susceptible of classification and coördination. Each department and subdivision of the general subjects has possibilities of development into a separate, highly specialized science. Many of these subjects suggested are susceptible of still more minute subdivision for scientific research. The art of investment, for example, will never reach its highest level till special research has been applied to its narrowest interests. Real-estate investments, municipal investments, insurance investments, investments in private companies, *etc.*, have already been differentiated in practice; and practice will profit from scientific specialized research in the same way that general surgery has profited from eye-and-ear surgery, oral surgery, nasal surgery, abdominal surgery, *etc.*

Professor Haskins classifies business education under three heads, *viz.* accountancy, finance and business administration; he does not, however, define the limits of the several subjects nor does he attempt to determine their interrelation. The editor has endeavored to meet the need of systematic division of the field. Under accountancy and finance he places, properly enough, the material that would naturally fall under those heads. The remainder of the field of business education he places under business administration. Against this classification serious objections will naturally arise. While the exact meaning of the term business administration is not fixed, analogy would suggest a meaning broader in some respects than this. Just as Professor Goodnow defines government administration as government in action, so it would appear most natural to use business administration as an inclusive term, cover-

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ing the whole field of business activities. Accounting, then, as a phase of business activity, would fall under the general head of business administration, as also financing, organizing of business, advertising, industrial processes and the like. On the other hand, it seems difficult to follow the editor in placing under this head such subjects as commercial law, industrial chemistry and architecture, although these may involve phases of business administration.

D. EARLE BURCHELL.

UNIVERSITY OF WISCONSIN.

The Growth of English Industry and Commerce in Modern Times. By W. CUNNINGHAM, D.D. Part I: *The Mercantile System.* Part II: *Laissez Faire.* Cambridge, The University Press, 1903. — Two volumes, xxxviii, xii, 1039 pp.

This edition of Dr. Cunningham's history of English industry and commerce differs from the former edition in so many respects that the reviewer resists with difficulty the temptation to treat it as a new book. Its growth by the addition of some two hundred pages, rendering necessary a division into two volumes, is the first but not the most important change that strikes us. "Hardly a paragraph," says the author in the preface, "has been incorporated in this edition without alteration." Sometimes these alterations appear to aim merely at a redistribution of emphasis, greater perspicuity or an easier transition from topic to topic; more often they consist in the presentation of new facts, either in support of an old conclusion or, as not infrequently happens, in justification of a complete change of opinion. Indeed Dr. Cunningham's readiness to revise important conclusions arrived at a brief decade ago when the former edition of his book was published, though it testifies to his open-mindedness and the fairness and impartiality of his investigations, yet evinces the alarming uncertainty of our knowledge of economic history. As we follow his present description of the broad features of the changes in English economic life, it becomes increasingly evident that it is based upon materials more varied and more abundant than have been accessible to any other writer. The list of these materials contains seven pages of documents and official publications, eighteen pages of histories and articles, and no less than thirty pages of titles of contemporary literature. Students will find this bibliographical index not the least valuable part of the book. It well merits rearrangement by subjects and separate publication.

Space is lacking to point out more than a tithe of the important

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changes and additions that have been made. As a result of his wider researches the author has

> given more attention to the economic affinities of different political personages and parties, . . . noted more definitely the disastrous effects of the Civil war on the social and industrial organization of the realm, and . . . [has] been able to write more justly of the Restoration period.

He has incorporated an excellent chapter by Miss Tomn on the policy of Lord Burleigh. He has given more space to the administration of the poor law. He has revised his treatment of the Statute of Apprentices, discussing it at greater length, and has reached the belief—contrary to his former opinion—that the clause providing for the annual assessment of wages by justices of the peace attained a widespread operation in the sixteenth century; but he is unable through lack of evidence to reach a definite conclusion with regard to the survival of the system. He devotes much attention to the Navigation Act, chiefly for the purpose of correcting mistaken notions about it. Thus he emphasizes the fact that the credit for initiating the principle embodied in it does not belong to Cromwell and the Council of State; he believes that the act did not seriously affect Holland, much less cause its commercial decay; he finds no proof that it benefited English shipping, while it promoted that of New England; and, on the whole, though "it may have had incidental advantages of which we can hardly judge . . . we can only wonder at the persistence with which the Council of Trade adhered to it."

From the Navigation Act the American reader naturally turns to the chapters dealing with colonial policy. In this field the author contributes little that is new, but he has made all modifications of his former opinions that are necessary for assimilating the results achieved by recent investigators such as Mr. Beer and Miss Lord. The reviewer is inclined to think that he over-emphasizes the missionary motive for colony planting in the seventeenth century. Individuals prominent in the movement, as Hakluyt and Ferrar, doubtless felt this motive strongly, and it fills much space in contemporary tracts and documents; but it seems incontrovertible that few of the actual emigrants to America left England for the purpose of carrying the Gospel to the heathen, and that little missionary enterprise was exhibited in any form. We think also that in his account of the expansion of the English the author should reckon with the spirit of adventure, the mere love of sport in the form of danger and difficulty incurred and surmounted, which has been a prominent trait of the people since the Norman conquest, but which was never more noticeable than in the life and the literature of the time of

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Elizabeth and the early seventeenth century. The author does justice to the colonial policy of James I and Charles I, and shows that though their actions were hampered by the exigencies of their situation, yet their attitude toward the young communities was one of kindly interest and good-will. His description of the commercial and industrial regulations of the second half of the seventeenth and of the eighteenth century, so far as they relate to the American colonies, follows in the main the monograph of Mr. G. L. Beer. He concludes that though certain features of the English policy gave rise to considerable grievance on the part of the colonies, yet on the whole the underlying principles of it were not unreasonable. Economic grievances gave an occasion for the final breach; "but they only pressed seriously because of the colonial lack of interest in Hanoverian politics, and because the colonies felt strong enough to work out their own political destiny without British protection."

The author leaves us little opportunity to take issue with his conclusions, for he sedulously avoids reaching any where there is room for doubt. Indeed, the most serious criticism that can be made of his book is that it is mainly a cold statement of facts with too little interpretation of them. This is due in part, perhaps, to the enormous amount of his information. "In modern times," he says, "it is particularly difficult to make the best use of the abundant materials which lie to hand, so as to bring the main outlines into view." He has not well surmounted this difficulty. The reader is well-nigh overwhelmed with a multitude of details whose real significance is apt to escape him. This is particularly noticeable in the second part of the book. The picture of the industrial revolution, for example, is blurred like the view we get of a landscape from a rapidly moving car. Nor is it easy, in spite of the detailed summary of the contents prepared by Miss Tomn, to keep the connection between the topics successively treated. This defect is heightened by the author's literary style, which, though it usually has the virtue of simplicity, is bald and uninteresting. No ray of color, no spark of humor, no literary device of any kind is used to relieve while holding the mind of the reader. The defect is of minor importance, however, and the criticism petty, since the book is intended for the student and the specialist, whose interest in the subject will counterbalance the lack of literary attractiveness and ensure the attention necessary to master the multitude of details.

The appearance of the book is an important event to the student of economic history. As it stands, it is a monument of painstaking industry and erudition. Its value as a reservoir of information for students

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greatly increases the debt we already owe to the author. Though it will never secure a wide class of readers, the small class that it appeals to must mark, learn, and inwardly digest it; and in assisting and in some degree guiding the work of this class the book will make permanent contributions to the thought of the twentieth century.

UNIVERSITY OF CALIFORNIA. THOMAS WALKER PAGE.

The Domesday Boroughs. By ADOLPHUS BALLARD. Oxford, The Clarendon Press, 1904. —vi, 135 pp.

Mr. Ballard has attacked a difficult subject. The complexities of his problems make those of the vill and manor seem easy in comparison. He has been compelled to leave many questions in abeyance and content himself with a presentation of the evidence. In his quest for the general theory or scheme which William's officers had in mind when they spoke of a "borough," he reaches conclusions that are largely negative. This, however, is no depreciation of Mr. Ballard's book, for it is a critical contribution to Domesday literature. It exemplifies the careful research in the Survey which is necessary to arrive at correct results; it is a warning to hasty generalizers; it destroys some time-worn theories that have got as far afield as Fiske's *Civil Government.* At the outset Mr. Ballard develops Professor Maitland's plan of classifying boroughs into simple and complex according to the homogeneity or heterogeneity of the tenure. The boroughs of the latter group being far more numerous and important, the author devotes most of his attention to them. He brings together a vast amount of useful evidence relating to the system of tenure, internal organization and financial arrangements. The tenurial relations of the composite borough to outlying properties and to non-resident lords are illustrated by excellent maps which ought to clear up the confusion of a novitiate in Domesday lore. No important phase of the borough is left untouched. There are, for example, a few pages on each of the following topics: relation of the borough to king, earl and sheriff, sac and soc, the borough court, the burgesses, the customs, the geld, the gablum, the mint, markets and tolls, military and other services, amends and forfeitures and borough property. Under the appropriate headings, the reader will find brought together materials from Domesday which represent long and patient research. Mr. Ballard attempts few generalizations, but those which he makes are important. He has not found much communalism in the boroughs. He has discovered only two clear-cut instances of property belonging to burgesses as a body (p. 89). The author's con-

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clusions concerning the borough and its court are also interesting although negative rather than constructive. Here he differs from Dr. Stubbs' view that its jurisdiction was cut out of the jurisdiction of the hundred court. He finds no evidence in Domesday that the borough, except in a few isolated cases, was a hundred of itself or that there was a separate borough court which excluded the jurisdiction of the hundred court. The creation of a separate exclusive court and the non-admission of the sheriff, he believes to be twelfth century work.

An appendix to the book contains useful and suggestive notes on the boroughs in Anglo-Saxon times. The value of this portion of the work is lessened by the lack of discrimination in the use of the documents printed in Kemble's *Codex*. Mr. Ballard has used without comment some of the charters which Kemble marks as of doubtful authenticity. At least four-fifths of the two hundred and forty pieces which Kemble printed in his first volume are taken from mediæval chartularies or other sources of a period later than Anglo-Saxon times. Therefore in using these materials, it is well to remember that the clerks who copied and forged were aware of the weight which antiquity gives to claims. However, Mr. Ballard has done a piece of work useful to students of Domesday and to that scholar who is to write the much needed history of English boroughs.

CHARLES BEARD.

The Administration of the American Revolutionary Army. By LOUIS CLINTON HATCH, Ph.D. Harvard Historical Studies, Volume X. Longmans, Green & Co., New York, 1904. — 229 pp.

By the American revolutionary army Mr. Hatch means the continental army, to the exclusion of the militia of the colonies, or states, which was more or less completely incorporated with it. Of the military systems of the states and the part which they contributed to the war he has little to say. His attention is directed toward the federal side of the system. His treatment of that, moreover, is confined chiefly to the army which was immediately under the command of Washington. The sources which he has used are chiefly those which center about Washington — letters from him and to him, his dealings with Congress, letters of the group of men who surrounded him and who were either his faithful servants or his secret enemies. Of the army of the North, which operated against Canada and captured Burgoyne, he makes little account. The same is true of the forces which were successively sent to the South or which were formed there. It is of course true that

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they were all ultimately controlled from a common center and that the system was the same throughout; but remote and very different surroundings in each case somewhat changed the problem, and the history of Washington's army is not quite synonymous with the history of the continental army as a whole.

Again, from the entire record of Washington's force and of the administrative system which it illustrates, Mr. Hatch selects and dwells upon certain leading facts. These are the formation of the army, the relations between Congress and the commander-in-chief, the appointment of officers and their promotion, the foreign officers and their place in the service, the question of pay and half-pay, the furnishing of supplies for the army, the Newburg addresses, the mutinies of 1781 and 1783, and disbandment.

The book is not a military history. Neither is it a treatise on the art of war as exhibited by the American continental army. It dwells rather on the political and governmental side of the subject. Its author seeks to explain the relations between the army — or chiefly its officers — and the civil power by which it was partly neglected and partly controlled. He is chiefly concerned with appointments and promotions, pay and the procuring of supplies. The first two subjects relate wholly to dealings of Congress with the army. The last named subject involves also relations between officers and men, and lies more within the scope of military administration proper.

Of the sources, so far as they fall within the scope of his subject, Mr. Hatch has made judicious use. The book contains a clear, sober and accurate portrayal of the facts. Its utility will also be found in its isolation of the group of facts which concern the army and its treatment of them on their own merits and dissociated from the multitude of other events which went to make up the Revolution. In these features, rather than in the presentation of specially new facts or novel views, will the value of the book be found.

Such a study as this, however, gives strongly the impression of an incomplete or monographic character, from the fact that it looks neither backward nor forward. The reader gains from it no impression of the system of military administration which preceded that of the American continental army, nor of the national system which followed it. It is true that any adequate consideration of these subjects would have led the author far afield. It would have forced him to consider the militia, as well as the army of Congress, and this would have involved a serious enlargement of his plan. But this book makes clear at once the lack and the value of a study which would show how great an advance on

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colonial conditions was made during the Revolution, and to what extent those same colonial traditions survived and affected the military system after 1775.

HERBERT L. OSGOOD.

Problems of the Present South. A Discussion of certain of the Educational, Industrial, and Political Issues of the Southern States. By EDGAR GARDNER MURPHY. New York, The Macmillan Co., 1904. — x, 335 pp.

The purpose of the volume under review is, the author states, "to discuss the rise of genuine democracy in the South" — a statement which places him among those persons who hold to the theory that ante-bellum Southern politics were essentially aristocratic or oligarchic, even as concerned the whites. The history of the "hill billy" influence in his own state, Alabama, accords ill with this theory. The discussion of the unifying influence — social and political — of the Civil war and Reconstruction upon the whites is clear and convincing. There is much insistence upon the fact that the "common man" has arrived since the Civil war.

The papers on education in the South are illuminating. The writer holds to the Southern view on all social questions, including the separation of the races in schools. He shows that, in spite of all discouragements, great progress has been made in the education of both races. The education of the negro has been undertaken in good faith by the overburdened Southerners, who are nevertheless lectured occasionally by ignorant Northerners for neglecting the blacks. The often mis understood "Ogden movement" is proven to be a distinctly Southern movement with an ornamental fringe of Northern financiers. Mr. Murphy makes some sharp and pertinent remarks about Northern criticism of things Southern.

The educational statistics given are like nearly all the statistics of the new educational crusaders — true, but not the whole truth. Why continually harp upon the fact that the school term is only 76 or 78 days, when it is well known that the schools, even the negro schools, are held for a longer period? The 76-day term is that paid for by the state. The most hopeful sign about Southern education is that practically all whites and many blacks willingly contribute by tuition fees to make the school term last six to eight months. The states have not, until recently, given liberally for education; but the people have carried on the schools nevertheless. Mr. Murphy ought to mention the fact.

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The negro problem is well handled. The evils of slavery are not emphasized to the neglect of its good. The attitude of the slave holder to the negro in slavery, and later in freedom, is fairly explained. The race problem is to be solved, however, by the joint efforts of the new negro and the new white man, neither of whom understands or cares much for the other. The author dismisses almost without discussion the question of future economic friction between the races. Lynching is denounced — as bad for the white. The tendency of all negroes to shield the black criminal is, we are told, giving way to a disposition to let the law deal with him. Social equality is a dogma not to be discussed, he says; the South has settled that for all time.

In politics, the Reconstruction policies are severely criticised, and recent disfranchisement is defended on the ground of expediency. Mr. Murphy discloses his lack of practical experience in politics by saying, almost hysterically, that for twenty years there has been no danger of negro domination in Southern politics under any circumstances. He thinks that the attitude of the whites makes the negro vote solid. In his own state within recent years there have been instances of negro domination. The Democrats went over in a body to the Populists to prevent it. For twenty-five years the negro voters stood ready, under their few white leaders, to take advantage of any division among the whites. That is why they were disfranchised.

The wonderful industrial growth of the South is proved by reliable statistics. Mr. Murphy has the art of making statistics interesting. Unlike most recent writers, he goes back to ante-bellum days to find the beginnings of Southern manufacturing. The Civil war destroyed many promising Southern industries. The child-labor evil in Southern factories is blamed upon New England capitalists who have mills in the South and who use their influence to defeat restrictive legislation. But is it not somewhat childish to call upon the conscience of New England to frown upon her capitalists and thus relieve the Southern children? Why cannot Southern public opinion be brought to bear upon the Georgia and Alabama lawmakers who were controlled by the New England mill owners?

All in all the book is a good one — packed with useful information concerning the South both past and present. It is written in an admirable spirit, in rather rhetorical language, by a Southern Episcopal minister whose very calling and station place him on the "outside" of the real life of the mass of the people. For Mr. Murphy, like so many of the best men, is not and has never been on the "inside" in regard to the crude social and political conditions in the South. He

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speaks for the old ruling, responsible element, the slave holders and their spiritual descendants; for the leaders of to-day, not for the followers. The followers in the South have more than once forced the leaders to "about face."

WALTER L. FLEMING.

WEST VIRGINIA UNIVERSITY.

A Journey in the Seaboard Slave States in the Years 1853–1854. By FREDERICK LAW OLMSTED. (Originally issued in 1856.) With a Biographical Sketch by FREDERICK LAW OLMSTED, JR., and with an Introduction by WILLIAM P. TRENT. New York and London, G. P. Putnam's Sons, 1904. — Two volumes, xl, 418, 412 pp.

This reprint of a celebrated book is timely and valuable, the biographical sketch of the author and Professor Trent's "Introduction" adding much that is interesting and suggestive. The comments of Professor Trent are especially happy and furnish the qualifications most desirable for the modern reader of the volumes. If only half is true in the tales of luxury and happiness that fill the volumes of recollections of the old régime in the South (as for example, Mrs. Clay's *A Belle of the Fifties*), the disagreeable picture of sordidness and squalor drawn by Olmsted must be to some extent inaccurate, and a corrective may be found in Trent's suggestion that Olmsted never came in touch with the best, or even the better, aspects of social life in the regions through which he passed.

Olmsted's observations of Southern conditions have always served historians as a conclusive justification of the movement for the extinction of slavery at any cost. He was a man of taste and refinement, trained in the best things of the most complex and progressive social conditions that were to be found in the United States. He found in the agricultural and undeveloped South very much that was, according to his standards, hopelessly backward and even barbarous. He ascribed the difference to slavery, and in this he has been followed by most Northerners who have read his work. Yet at the present day, when slavery has been extinct for forty years, an observer trained in relatively the same environment as Olmsted and repeating his tour of the South could and would find occasion for just as severe comment as that in this *Journey through the Seaboard Slave States*. The differences between Northeast and South in social and industrial conditions are as great now as they were in the fifties. There has been absolute but not relative change. Slavery cannot be alleged as the cause to-day; probably it was not the cause then; certainly it was not the most fundamental cause. If the negro had

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anything to do with the matter, it was because he was negro, not because he was slave. It is time historians —and practical politicians as well— should begin to take this fact into account. The inveterate habit of attributing solely to the existence of slavery—which has in all conscience enough ills rightfully chargeable to its account—the general social characteristics which were produced in America, as they have been produced in every land known to history, by the presence of an inferior race by the side of a superior race too proud and self-conscious to tolerate amalgamation—this habit should in the twentieth century be at last discarded.

Olmsted's *Seaboard States* and other volumes will always have a great value for their record of facts; but this value will be at its maximum only if a proper allowance be made for the now wholly antiquated character of his interpretations.

WM. A. DUNNING.

North Carolina: A Study in English Colonial Government. By CHARLES LEE RAPER, Ph.D. New York, The Macmillan Company, 1904. — xiii, 260 pp.

Dr. Raper's excellent study of North Carolina government in the period of royal control is perhaps the best and fullest work which has appeared on North Carolina history since the publication of the *North Carolina Colonial Records* in 1886–1890. It follows the general plan of other monographs in the same series, as Smith's *South Carolina*, in analyzing minutely and scientifically the government of one of the royal provinces in America. It treats in successive chapters of the governor, the council, the lower house of the assembly, the "territorial system" (*i.e.* the land system), the fiscal system, the judicial system, the system of defence, and in two closing chapters it discusses the conflict between the lower house of the assembly and the governor and the downfall of the royal government. The book is written in the manner of solid and creditable scholarship. It will prove a valuable source of information to the student of American colonial institutions. It shows the process by which an American community passed through its formative period, and brought its forms of government to that stage of development at which they were able to take on themselves the support of an independent state.

Till the publication of the *North Carolina Colonial Records* this study could not have been made. The little which was then known about North Carolina colonial institutions was drawn chiefly from the documents which Dr. Hawks collected for his history and from the scant

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unpublished records in the office of the secretary of state in Raleigh. The ten volumes of the *Colonial Records*, however, contain the richest collection of documents from the English public archives. From these one may learn the ultimate word about the colony's history. The careful examination of them which is now presented to the public meets all the requirements of a final discussion. It has been made with pains and intelligence, and with how great difficulty one will guess when he learns that the series out of which most of the facts are taken is entirely without an index. With what appreciation of scientific truth Dr. Raper has written one may see in the fact that he rejects the locally popular story of the "Mecklenburg declaration of independence." He goes so far as to say, in effect, that the resolutions of Mecklenburg county were not so radical as the action of Cumberland and New Hanover counties in organizing armed resistance to England. The treatment of the "War of the Regulation" is similarly unbiased. This struggle is described as a kind of peasants' rising, and not, as many people have hastily concluded, the initial phase of the revolution in North Carolina. Such sane treatment of controverted points speaks well for the prospects of North Carolina history when it shall fall into the hands of its young scholars.

TRINITY COLLEGE, N. C. J. S. BASSETT.

Das Wesen der Ministerverantwortlichkeit in Deutschland. Eine staatsrechtliche Studie. By RICHARD PASSOW, Ph.D., J.U.D. Tübingen, Verlag der H. Laupp'schen Buchhandlung, 1904. — vii, 79 pp.

This monograph deals scantily with a subject which the German writers have generally neglected. It possesses a special interest, on account of the recent agitation of the Social Democratic party looking to an extension of the responsibility of the imperial chancellor to the Reichstag. The monograph contains (1) a review of the forms and general principles underlying the system of ministerial responsibility in monarchical states; (2) an analysis of the constitutional provisions of the several German states relating to the responsibility of ministers; and (3) a discussion of the status of the imperial chancellor.

The forms of ministerial responsibility are described as disciplinary, criminal, civil, constitutional and politico-parliamentary. The first form exists only in absolute monarchies, the second and third do not differ essentially from the responsibility of other officers or private citizens, while the fourth form has reference only to a special respon-

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sibility prescribed in the constitution for certain acts or omissions. Only the fifth form, which has reference to the responsibility of the ministry to the legislature for its political and legislative policy, is of particular importance. The practical necessity of an irresponsible head in monarchical states and the connection between such a personage and a responsible minister are briefly but clearly discussed. The author's analysis of the constitutional provisions of the several German states relating to ministerial responsibility is but little more than a digest. Many of these provisions, he says, need revision, because they have been modified by the adoption of the imperial constitution and are, moreover, out of harmony with the actual practice. The position of the imperial chancellor is discussed mainly in the light of recent events and has therefore a present interest. The proposition of the Social Democrats to make the chancellor responsible to the Reichstag for his official acts and to extend his responsibility to the political acts of the emperor is the subject of the concluding chapter of the monograph. From the point of view of those who desire parliamentary government in the German empire, it may well be maintained that such an amendment is necessary definitely to fix and to enforce that responsibility which the imperial constitution declares shall attach to the chancellor. Whether Germany is ready for parliamentary government is another question.

J. W. GARNER.

UNIVERSITY OF ILLINOIS.

The American Constitutional System. An Introduction to the Study of the American State. By WESTEL WOODBURY WILLOUGHBY. New York, The Century Company, 1904. — xvi, 323 pp.

This is the introductory volume to a series of works on the government of the United States of which Mr. Willoughby is the editor and which, we are told, may be followed by another series devoted to the study of the activities of the American state. The aim of the present volume, to use the language of the author, is to "disclose the constitutional character of the American state, to explain the status of its various territorial subdivisions and to indicate the extent of the powers of their several governments." It is not a comprehensive treatise on constitutional law but a general survey of the constitutional character of the American republic — "an attempt," to quote again from the preface,

to determine whether ultimate sovereignty is to be found located in the United States viewed as a single national entity or in the constituen

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commonwealths or divided between the federal state and its political members . . . to explain the manner in which, in actual practice, the integrity of our national government and the supremacy of its laws have been secured without at the same time destroying that independence of action on the part of the individual states which is characteristic of the federal system.

The body of the work consists of nineteen chapters on such subjects as the nature of the state; the development of national sovereignty; secession, coercion and reconstruction; the relation of the national and state governments; the power of the United States to acquire foreign territory and the purposes for which it may be held; the rights of the inhabitants of the territories; citizenship; interstate relations, *etc.* As a whole the volume is a model of conciseness and lucidity. It is undoubtedly the best brief account of the American federal system from the viewpoint of its constitutional character that has yet appeared. Professor Willoughby's discussion of the nature of the state, however, is open to criticism. It is not wholly free from confusion of thought if not contradictions of statement. Thus on page 4 the author defines a "people" as "the whole body of individuals viewed as a political unit"; in the following sentence we are told that the state is not the people; and at the end of the paragraph it is said that the state is the "given community of individuals viewed in a certain aspect — namely as a political unity."

This criticism, however, cannot be made as regards Professor Willoughby's discussion of the various historical theories of the nature of the Union. The view that the states were never legally sovereign, that during the period of 1781–1789 they "usurped" the national sovereignty and that the adoption of the Articles of Confederation was a step backward so far as the national development was concerned, he criticises as illogical and unwarranted by the historical facts. He thus takes issue with the view of Burgess that during the confederate period the American state ceased to exist objectively and yet continued to exist subjectively as an idea and asserts that the two are necessarily but different aspects of the same thing and can be disassociated in thought only. It is the overwhelming testimony of history, he says, that the people of that time, with practical unanimity, held the view that the states were sovereign and that their opinion is supported by a reasonable interpretation of the facts. But this admission is not irreconcilable with the view that a national state was created in 1789. Indeed, he claims, there is abundant historical evidence to show that the people intended to establish and believed they were establishing a

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national state without the right of nullification or secession upon the part of individual commonwealths. Professor Willoughby points out that these views were logically contradictory in fact, that had the people of the time been political philosophers of keen insight they could not have accepted such theories, and that if the fact had been clearly presented to them that they must choose between national sovereignty and state sovereignty the constitution would have failed of ratification.

The discussion of national sovereignty consists mainly of a review of the decisions of the supreme court beginning with the case of Chisholm *v.* Georgia in 1793. Professor Willoughby shows that after the reconstruction of the court under Jackson a reaction followed and that from then until the Civil war its great influence was thrown on the side of the states and in favor of strict construction, but that nevertheless the court never failed to uphold federal supremacy whenever it was involved. And so with regard to the executive department in dealing with the nullification and secession movements, no department or public official of the federal government in case of threatened or actual conflict between the state and national governments ever failed to assert the supremacy of the latter. As regards the coercion of a state Mr. Willoughby points out clearly the distinction between the right of the government to compel obedience to its laws and its right to proceed against a delinquent or recalcitrant state. Concerning the theories of Reconstruction he declares that the "Southern Democratic or restoration" view was the one "most nearly in consonance with the general constitutional theory upon which the North had declared and waged the war." His discussion of the status of the Confederacy might have been improved by a reference to the case of Thorington *v.* Smith, while his review of the notable decisions of the supreme court concerning Reconstruction might well have included the Milligan case. Mr. Willoughby criticises as "most dangerous" the tendency of the supreme court to rely upon the doctrine of "inherent sovereign rights" as a basis for extending the powers of the national government. His review of the several decisions in which such a view has been relied upon certainly should have included the case of Julliard *v.* Greenman. Fifty-five pages or nearly one-fifth of the volume is given up to a discussion of the territories while the important subject of citizenship is disposed of in eight pages—hardly an equitable apportionment.

Unimportant typographical errors are the references to the "Wade-Davis" reconstruction plan as the "Davis-Wage" plan (p. 90) and to Geo. T. Curtis as J. T. Curtis (p. 298).

JAMES WILFORD GARNER.

UNIVERSITY OF ILLINOIS.

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The American City: A Problem in Democracy. By DELOS F. WILCOX, Ph.D. New York: The Macmillan Company, 1904. — vii, 423 pp.

Local Government in Scotland. By MABEL ATKINSON, M.A. William Blackwood & Sons, Edinburgh and London, 1904. — x, 441 pp.

Handbook of the Law of Public Corporations. By HENRY H. INGERSOLL, LL.D. Dean of the University of Tennessee School of Law. St. Paul, Minn., West Publishing Company, 1904. — xvii, 738 pp.

Proceedings of the Chicago Conference for Good City Government and the Tenth Annual Meeting of the National Municipal League. CLINTON ROGERS WOODRUFF, Editor. Philadelphia, National Municipal League, 1904. — vi, 416 pp.

The books whose titles are set forth above, while all devoted to the important subject of local government, are so different in purpose and character each from the others as to indicate at once the extent of this field of political activity, and to impress upon the student of it the difficulty and complexity of the task which he has undertaken.

Dr. Wilcox's *American City* is, as its title indicates, written on the assumption that the municipal problem, in the United States at any rate, is "a problem in democracy." He conceives of no other solution of the problem of governing properly large masses of people in small areas than through the widest possible participation of the city population in the work of government. At the same time he exhibits what in some instances appears to be an unreasonable abhorrence of city life and its almost inevitable incidents, and arrays himself in that class, whose members were probably more numerous formerly than now, who regard the city as an evil albeit a necessary one. Conditions so unfavorable to character as are, in his view, those of urban life would of course naturally result in the development of a political population in which the establishment of democratic institutions, sufficiently stable to resist the tendency toward ochlocracy, would be almost impossible. If Dr. Wilcox left the subject here he might naturally be accused of inconsistency, if not of something worse, but he is not unwilling to gird himself for the next logical step, which is little short of the attempt to reform our poor human nature. *The American City* is, in large part, an effort to point out how by voluntary effort and by social coöperation through

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governmental agency certain of the fundamental characteristics of modern industrial individualism may be changed, so as to produce a more favorable environment for the development of that democratic city government which the author sees, somewhat as a vision, in the far distant future.

But while a good part of Dr. Wilcox's book cannot be regarded as of great value from the point of view of the needs of the present and immediate future, it must not be supposed that it is devoid of practical use. *The American City* contains a vast deal of information as to details of city government in the United States, and shows that the author has been at great pains to acquaint himself with the various devices to which American cities have had recourse in order to perform in a satisfactory manner the functions which have devolved upon them.

Dr. Wilcox, it may be said in conclusion, has a mind which is rather sociological than legal in character. He sees everything almost exclusively from the point of view of the needs of the population gathered together in our urban centers, and he therefore regards as a part of his subject many matters with which the city corporation as a political entity has little if anything to do. His tendency furthermore is to dwell upon the evils of existing conditions and to suggest for their remedy a greater activity on the part of politically organized municipal society. Finally, Dr. Wilcox's emphasis of the functional side of his subject results in somewhat scant treatment of the institutional aspect of the municipal problem. This is treated almost as an incident as compared with the functional side of the subject. The result is that one rises from a perusal of his book with rather hazy ideas as to how the American city is governed. This characterization of his work is made, however, rather by way of description than of criticism. For since the tendency of most American writers on city government is to emphasize the problem of organization almost to the exclusion of that of function, a full description of the functions of American cities is valuable. It calls attention to the fact that the problem of municipal organization is solved only in so far as its solution secures the satisfactory discharge of those functions which the existence of a comparatively congested population has imposed upon our cities.

To the local sociologist *Local Government in Scotland* will perhaps be less interesting than *The American City;* to the student of local institutions, however, it is much more satisfactory. It is an attempt to treat from both the historical and the legal points of view a subject which up to the present time has hardly been treated at all. The author modestly refers in her preface to her book "as an introduction for the

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student to a field hitherto curiously neglected" and expressly disclaims any pretentions to the production of an exhaustive treatise. While it may be true that *Local Government in Scotland* would not be of great value to the practising lawyer, it is none the less true that Miss Atkinson has given the student of administration a most careful, thorough and interesting book on the subject which she has chosen.

As to the value of this subject to the American reader, one may have some doubts. The state of things in Scotland, largely because of the ecclesiastical conditions existing there, has been so peculiar that almost the only lesson to be derived from a consideration of the historical development of its local governmental system is the unwisdom of doing in the future what has been done in the past. Furthermore, the influence of English example has been so strong that Scotch local government can, in its broad lines at any rate, be regarded as little more than a Scotch variation of English institutions. The same development of what Miss Atkinson terms *ad hoc* bodies, with resulting multiplication of authorities, the same tendency towards a transfer of functions from smaller to larger administrative areas, and the same attempt to put new life into the smallest unit, the parish, which are characteristic of recent English administrative development, are noticeable in North Britain; and the same tendency is to be remarked towards the establishment of central administrative control.

What has just been said is particularly true, however, of rural local government. When we consider Miss Atkinson's treatment of the municipal development of Scotland, the value of her work to the American student naturally increases, for the problems of municipal government are everywhere much the same. One of the things to which Miss Atkinson calls attention, in connection with her treatment of city government, is the development of a permanent professional municipal civil service, whose existence is due not so much to general laws (as is the case in the United States) as to the growth of a sound public opinion. Public judgment, as shown in the actions of the municipal authorities, insists on choosing the technical subordinate officers of municipal corporations on their merits, considered from the point of view of the duties they are to discharge, and refuses to confine the selection of such officers to the inhabitants of the city which they serve. This point, while not a new one, since it has been brought to the attention of the American reading public by Dr. Albert Shaw's interesting work on *Municipal Government in Great Britain* is one whose importance for the good conduct of city government cannot be overestimated. For it is to this habit of mind in the people and their representatives rather than to the form of

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government possessed by the Scotch cities that the excellence of their administration is due.

Another point which Miss Atkinson makes, and this would appear to be a novel one, is that, notwithstanding the legal concentration of almost all governmental power in the hands of a city council, the government of Scotch cities is as a matter of fact in some cases almost as little concentrated as it is in the United States under the board system of city government. This lack of concentration is due to the jealousy exhibited by the various council committees, each one of which has by custom secured the practically uncontrolled management of one of the various branches of city government. Attention is called to the behavior of the council committees of the city of Glasgow, where the police side of the city prosecuted the municipal tramway conductors for permitting the overcrowding of the municipal tramcars. "The public," our author says, "was a little bewildered by this proceeding, as it seemed not unlike the dilemma of the lord chancellor in *Iolanthe*, when he wondered if he could consent to his own marriage with his own ward." This episode would seem to show, as so many of our experiences in city government have already shown, that efficient city government is not assured by any device of organization.

Attention should be called further to the opening chapters of Miss Atkinson's work, which are devoted to the attempt to ascertain what is local government. These chapters, and particularly chapter ii, are of the greatest value to one who is interested in obtaining a scientific dictinction between central and local government.

While the books which have thus far been considered have been almost exclusively devoted to the social and political sides of city life, Dr. Ingersoll's book on *The Law of Public Corporations* is given up almost exclusively to the legal side of the subject. The only exception is the inclusion among public corporations of such private corporations — *e. g.* railroad, street railway, telephone and telegraph companies — as by the law are regarded as discharging public functions. The reason for the inclusion of this class of corporations is to be found probably in the fact that the relations of the purely public corporations with such bodies are often extremely close. Dr. Ingersoll's book, which is one of the "Hornbook Series," is confessedly somewhat elementary in character, and it is doubtful whether the place it aims to fill was not reasonably full before its publication. It is altogether too elementary in character to take the place of Judge Dillon's monumental work. It is not sufficiently different in character to claim a place beside Dr. Elliott's book, nor is it so superior in execution as to supplant that excellent little work.

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The reason for its publication is probably to be found in the fact that hitherto there was no book on this most important subject in the series in which it figures.

As the "Hornbook Series" is based on the deductive rather than the inductive method, Dr. Ingersoll's book formulates principles, easy of comprehension and brief enough to be committed to memory, and adds explanations and qualifications which are substantiated by references to reported decisions. The effort at brevity which such a plan requires has sometimes resulted in an unfortunate, if not a misleading, statement of the law. Thus in the chapter devoted to "The Charter," the general rule as to the powers possessed by a municipal corporation is stated as follows:

> The municipality possesses no other powers than
> (a) Those expressly enumerated in the charter;
> (b) Such as are necessary for their appropriate use and execution;
> (c) Such as are inherent in every municipal corporation.

Such a statement of principle is unfortunate because it does not give even an indefinite idea of the rules of law which it presumably attempts to include; and it is misleading in that it conveys to the student the idea that there are important powers inherent in a municipal corporation — an idea which the better rule of law does not recognize. It would have been much better to restate the famous formulation of the rule as to municipal powers made by Judge Dillon. Again, it is said, in the attempt to distinguish employees from officers, that "a municipal employé is one engaged in the service of the municipality." This statement is equally true of an officer, and it gives to the student not even the glimmering of an idea as to the real distinction between officer and employee.

In some instances the statement of principle, while formulated clearly, is absolutely incorrect, or embodies what is generally regarded in the United States as legal heresy. Thus on page 199 it is said that "in the absence of constitutional inhibition, the legislature . . . cannot interfere with those officers who perform functions of a distinctly municipal character." Perhaps this ought to be the law, but as a matter of fact it is not the law. It is only fair to the author to say that he qualifies this statement somewhat in the main body of the text. But it is to be noticed that in a good number of the cases cited in support of his rule the decision rests on the existence of a constitutional inhibition on the power of the legislature, and that these cases are cited as if the courts were uninfluenced in their decision by such special inhibitions.

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Of course it is not to be understood that all the author's statements of principle are open to the above criticisms; but it should be noted that attention has not been called to all the statements which are so open. It is to be regretted extremely that a book which will naturally be used much more by students than by the legal profession contains so many inaccurate or misleading statements. The instructor who adopts the book as a text will have to be continually on his guard, if he hopes to have his students leave the class-room with correct ideas as to what the law is.

The Proceedings of the Chicago Conference for Good City Government are, like the former volumes of the proceedings of the National Municipal League, composed of a record of the work for good city government, from the pen of the editor, Mr. Woodruff, and of a series of papers and addresses. Some of the papers deal with the general subject of municipal reform, viewed in the light of the experiences of particular cities; others treat of the particular reform to which the league for the past few years has been devoting its energies, *viz.* proper municipal accounting. Valuable papers on this special subject are contributed by Dr. E. M. Hartwell and Mr. Harry S. Chase of Boston, Dr. Cleveland of New York and Dr. Powers of the United States census bureau. Other matters to which the attention of the league was directed during the past year are nomination reform—on which subject are published papers by the late Charles B. Spahr, Mr. Horace E. Deming and Mr. Geo. W. Guthrie—and the teaching of municipal government in the public schools.

The Chicago conference whose proceedings are here given to the public is particularly interesting as marking the completion of the tenth year of the existence of the National Municipal League. During the first decade of its existence it has accomplished work of great importance. It has not only collected information on the conditions of city government in the United States which has been of the greatest value to students of the subject; it has also exerted a direct influence upon public opinion. It is doubtful if there is any association in the country which has been more successful in fulfilling the purposes of its foundation. It is a source of great pleasure to those interested in its work to learn from this volume that the league is showing the same energy which has characterized it from its foundation in grappling with the problems which to those responsible for its management have seemed of the greatest importance.

FRANK J. GOODNOW.

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The Government of Maine: Its History and Administration. By WILLIAM MACDONALD. New York, The Macmillan Company, 1902. — ix, 263 pp.

The Government of Minnesota: Its History and Administration. By FRANK L. MCVEY. New York, The Macmillan Company, 1901. — xi, 236 pp.

The two books before us belong to a lengthening series upon state and local government in the more important commonwealths, under the editorship of Professor Evans of Tufts College. The general plan of both is the same. There are chapters upon the early history of the colony or territory, the growth and development of the state, its present political organization and administration, local government, nominations and elections, judicial administration, education, protection of the lives, property and well-being of the citizens, and state and local finance, followed by appendices containing the most important documents and data relating to the subjects discussed. The series is evidently intended for use in secondary schools and colleges. The main principles and facts are briefly stated, and there is no attempt to overburden the work with multitudinous details.

A perusal of the two books by Professors MacDonald and McVey suggests many contrasts. Maine is among the oldest, Minnesota among the youngest of commonwealths. The political institutions of the former are largely of English origin, subject to certain modifications which economic and political development have rendered necessary. The customs and conservatism of New England are clearly reflected, and experiments in legislation have not been frequent. Where new conditions have compelled modification, it has been made slowly, reluctantly and in moderate degree.

Minnesota is New England, but not in the same sense that Maine is England. Its people have not been bound so closely by custom and tradition. They have inherited many of their political ideas from the Northeast, but the modifications have been many and often vital. The optimistic, democratic, vigorous life of the Northwest has manifested itself in the political institutions and governmental forms of the new territory. Further, the government of Minnesota more nearly represents current political thought and modern tendencies.

Illustrations are numerous. Maine is among the last to retain the council as an advisory body to the governor. In most instances, it has been either dropped or combined with one house in a bicameral legisla-

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ture. Minnesota never adopted this fifth wheel. In Maine the town is by far the most important local subdivision; in Minnesota, it shares its prerogatives with the county, the functions of which are very much broader than in New England. The town meeting obtains in both states, having been brought west by the early settlers and incorporated as a vital part in their democratic local government. But the Minnesota township is in a sense an artificial area, carved out by the government surveyor with mathematical precision irrespective of topographical conditions or economic development, whereas in Maine the town generally followed, both in course of time and in character, the settlement and industrial growth of the various localities.

Minnesota, further, is free from many of the anomalies which still persist in Maine. For example, the municipal officers of the latter state "are required to perambulate the boundaries" once in five or ten years, which reminds one of the English practice, more common formerly than at present, of performing the same duty amid the huzzahs of the populace, attracted thither by the promise of a bun and a shilling to each child.

That the government of Minnesota is more directly in touch with modern political thought is shown by the methods of incorporating cities. The Minnesota constitution forbids special legislation, dividing the cities into four classes according to population. For each class a general act of incorporation has been passed by the legislature. In Maine, each city has a separate charter and "no two city charters are quite the same." The state legislature may amend a charter or repeal it entirely, without let or hindrance. But curiously enough, in each state there is provision for the drafting of charters by the cities themselves. The Maine custom ordains that the city shall draft a charter, present it to the legislature, which shall not amend it except in minor points, and then submit it for adoption or rejection to popular vote (MacDonald, p. 63). In Minnesota, amendments to the constitution adopted in 1896 and 1898 provide that any city or village "may frame a charter for its own government as a city consistent with and subject to the laws of this state" (section 36).

With so much to commend in the plan and execution of the two books before us, one may easily pardon the few errors of fact and judgment which have inevitably crept in. Many readers will wish for more complete data on certain points than are presented, but generally the perspective is excellent, and the most important facts both in law and in practice are set forth with clearness and exactness. A more comprehensive and critical analysis, however desirable, would fail to produce books suited to the purpose for which these are intended.

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BOOK NOTES

Outlines of Comparative Politics, by B. E. Hammond, (London, Rivingtons, 1903) is a distinctly interesting volume, intended as a text-book for beginners. The author was a pupil of Seeley and Sidgwick, and he is convinced, as they were, that politics can be cast into the form of a true science primarily by a classification of states and governments. The volume is devoted to the construction of such a classification from a consideration of the more important political organizations known to history. Possibly the treatment of the politics of the better-known states—like Athens, Rome and Florence—is more detailed than the plan of the work imperatively requires. But however this may be, both the descriptive and the constructive parts of the volume are full of suggestion and well worth reading. States are classified as follows : (1) simple states, including tribes, simple cities, independent fiefs and unitary nations; (2) composite states, including compulsory unions and voluntary unions, each with an interesting group of sub-classes.

The Macmillan Company has just issued a new enlarged and revised edition of Mr. James Bryce's classic *Holy Roman Empire*, which first appeared some forty years ago (London and New York, 1904; lii, 575 pp.). The author has added an entirely new chapter on "The East Roman Empire," and the supplementary chapter on Germany since the dissolution of the old empire in 1806 has grown into two. Minor additions have been made here and there and notes altered, but in general the text remains unchanged. An elaborate chronological table of important events in the history of the empire has been added, but the old useful table of emperors and popes is retained. The author is well aware that in view of the advance in scholarship during the past generation the whole book might have been rewritten, but he wisely decided to adhere in general to its original form, lest it should grow so large that its central idea and purpose would be lost or obscured and the book would no longer be adapted to the large class of students who for so many years have gladly availed themselves of its guidance.

Under the title *Mediæval Civilization* Professor Dana C. Munro and Mr. George Sellery of the University of Wisconsin have brought together translated extracts from various authoritative recent writers, especially in France, which admirably illustrate the most important of the mediæval institutions. Bloch, Lavisse, Esmein, Viollet, Luchaire, Seignobos and others of their class are drawn upon, greatly to the ad-

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vantage of those to whom their works are at present inaccessible. Teachers and students cannot fail to clarify their ideas of feudalism, the church and the culture of the thirteenth century by means of this excellent and timely volume, which deserves to be widely known and used in both high schools and colleges. (New York, The Century Co., 1904; x, 391 pp.)

The French literature on economic history is growing fast. The two most recent works are the study of mediæval industry in Rennes by Armand Rebillon, entitled *Récherches sur les anciennes corporations ouvrières et marchandes de la ville de Rennes* (Paris, Picard et Fils) and secondly, the investigation into industry at Brussels by G. des Marez, entitled *L'Organisation du travail à Bruxelles au xv^e siècle* (Bruxelles, Henri Lamertin). M. Rebillon's work is a detailed account of the relations between the city and the guilds, and consists chiefly of annotated extracts from the official documents, which it is very convenient to have in this shape. M. des Marez, whose preceding studies on municipal real estate and on the social struggles in Flanders, as well as on early economic conditions in Ypres, are well known, has written a far more important work. Relegating his documentary material to the notes and appendices, he gives what is in some respects the most interesting and valuable account of mediæval industry that has yet been written outside of Germany. He is thoroughly familiar with the present day controversies on the subject in Germany and elsewhere, and he is not afraid to make broad generalizations, although he repeatedly warns us of the danger, then as now, of overlooking the manifold complexities of industrial life.

August Fournier's admirable *Napoleon the First* has at last, after many delays, found its way into English through the patient efforts of Professor Edward Bourne of Yale. (Henry Holt and Co., 1903; 836 pp.). Written by a professor in the German University of Prague for a cheap series of popular German manuals, this work possesses substantial advantages over any of its predecessors, whatever their compass. It still is in several important respects the best account of Napoleon's rôle in European affairs, for it is not a biography in a narrow sense but a broad, scholarly and fair-minded review of the history of Europe during the Napoleonic period. Sloane and Rose have written since Fournier, but they had other aims and leave a place for this life in one volume which will exactly meet the needs of many who will hardly be inclined to acquaint themselves with the more elaborate treatises. The classified bibliography, which Fournier appended to his volumes and which Professor Bourne has wisely included, is probably unexcelled as a guide for the whole period under discussion.

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The Influence of Grenville on Pitt's Foreign Policy, 1787–1798, by Ephraim Douglass Adams, has recently been published by the Carnegie Institution. It appears to be a reasonably thorough study of an important decade of English diplomatic history.

Professor Frank M. Anderson of the University of Minnesota has rendered a very important service to teachers and students of modern history by issuing his *Constitutions and Documents Illustrative of the History of France, 1789–1901* (Minneapolis, 1904; 660 pp.). The material given is abundant and excellently selected, and serves to illustrate all the more important phases of the very complex changes in France since the meeting of the Estates General in 1789. About one-third of this solid volume is devoted to the period before the establishment of the Constitution of the Year III, in 1795. Another third relates to the times of the Directory and Napoleon; while the last third carries us from the Treaty of Vienna to the Law of Associations, July 1, 1901. Professor Anderson's volume will prove very valuable even to those who have both a large library and an ample knowledge of French at their disposal, since he brings together indispensable material which is scattered about in vast collections like the *Histoire parlementaire*, the *Archives parlementaires*, Napoleon's correspondence, the *Moniteur*, and elsewhere. The translations are by various hands, since Professor Anderson quite properly availed himself of work which had already been done. Unfortunately, however, some of the translations are not only infelicitous, they are ungrammatical and incorrect. For example one of his coadjutors persistently uses "will" for "shall." Then, except for an occasional circumflex, all accents and cedillas are omitted from French words. Now it may be very perverse of the French to use accents, but we should adjust ourselves to this idiosyncrasy of theirs. To substitute *lycee* for *lycée*, *cures* for *curés* and *general* for *général* seems like downright illiteracy to one who knows the language otherwise than from afar. French always avenges itself on one who thinks that it is easy because it looks so.

Mr. C. H. Firth, the newly appointed Regius Professor of History at Oxford, in his inaugural lecture, (Oxford, Clarendon Press, 1904) declares strongly in favor of giving colonial history a prominent place in the higher teaching of that university. He also favors the appointment of a special teacher of economic history. The establishment of a school or department of diplomatics is also strongly urged. Professor Firth will devote his personal attention to the period of the Stuarts, 1607-1714.

Mr. H. de B. Gibbins's *Economic and Industrial Progress of the*

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Century (*The Nineteenth Century Series*, vol. xv; the Linscott Publishing Company, London, Toronto, Philadelphia, 1901; 524 pp.) is a praiseworthy and on the whole, a successful attempt at presenting a comprehensive view of the economic development of the last century. Chief attention is devoted to English industrial history; but a generous space is given to other countries also, especially the United States, France and Germany. The purpose of the work is to meet the needs of the general reader; hence anything like detailed study of any part of the field was precluded. While the book cannot be said to add anything to the existing body of scientific knowledge, it is well worth the perusal of anyone who wishes to gain a tolerably accurate view of recent industrial history without the labor that a systematic study of more thoroughgoing treatises would entail.

Dr. Henry C. Taylor, in his little monograph, *The Decline of Landowning Farmers in England* (Bulletin of the University of Wisconin, No. 96, 1904), has made a valuable contribution to economic history and turned a good furrow in the new field of agricultural economics. Thoroughness and completeness are among the first impressions left in the reader's mind. This is the first quantitative treatment of this great subject, and when the amount of material used is considered it is easily seen that more general writers might well hesitate to undertake the task. Dr. Taylor has confined himself to facts—apparently all the leading facts are included—and has advanced a few theories. His statement of facts, however, is clear and courageous. Many will be surprised at the last sentence: "On the other hand, the relation between landlord and tenant is very satisfactorily arranged, the farmers are as a rule contented with the present system, and the fields of England prove that land ownership on the part of farmers is not essential to good agriculture" ; but we have reason to believe that Dr. Taylor knows what he is talking about.

Sir Robert Giffen has collected under the title *Economic Inquiries and Studies* (London, George Bell & Sons, 1904; 2 vols., xii, 455, 461 pp.) a number of essays, most of which appeared in periodical literature or formed a part of his *Essays in Finance*, now out of print. The present collection covers a wide range of financial and statistical studies, and although some of them were first published thirty years ago, they all possess a high degree of importance for the student of practical economics. Especially interesting are the last two essays, on "The Dream of a British Zollverein," and on "The Present Economic Conditions and Outlook for the United Kingdom." The latter, which has not been hitherto published, should do much to dispel the fear that the

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economic decay of Great Britain is imminent; the former exposes the shallowness of the reasoning of those who propose an imperial customs union as a step toward the consolidation of the British Empire.

Professor Achille Viallate's *La Crise Anglaise* (Paris, Bibliothèque de politique contemporaine, Dugarric et Cie.; 306 pp.) is a sane and lucid discussion of some of the broader problems involved in the so-called fiscal controversy now occupying so large a share of the activities of British political writers. The ideal of British imperialists is treated with sympathy; the author is convinced that its realization alone can prevent England from falling out of the rank of great nations; but the practical difficulties which confront the imperialist statesman appear to him insurmountable. Too many immediate sacrifices are involved; the colonies cannot be expected to abandon their independence, nor will the mother country be content to yield her hegemony by entering into a confederation of equal states. Even commercial union appears to be quite impracticable. The colonies will not permit British competition to destroy their growing manufactures; the British public will not endure taxation of food for the benefit of the colonies. Altogether, the outlook appears disheartening to those who wish to see the British supremacy of the last century perpetuated.

The Right Hon. A. J. Balfour's *Economic Notes on Insular Free Trade* (Longmans, 1903; 32 pp.) treats the same subject from a purely economic point of view. The method employed is so similar to that of the economic theorists that it almost takes an expert to detect the spurious quality. The author constructs a series of hypotheses to establish the fact that a free-trade country which is not self-sufficing is in a bad way if all its neighbors pursue a policy of high protection. Unfortunately he makes no endeavor to show that a protectionist country, in the same situation, would be much better off. He arrives at a sufficiently sound conclusion however: that a British protective system, used as a basis for negotiation with other countries, might possibly serve to open foreign markets to British goods. And it seems to him absurd that the British should hesitate to experiment with retaliation, simply because its failure would involve protective taxation.

M. Jivoïn Péritch, professor of law at Belgrade, reprints from the *Bulletin* of the French Society of Comparative Legislation a careful study of the organization of government in the Servian constitution of 1901 — *La nouvelle constitution du royaume de Serbie: Première partie: De l'organisation des pouvoirs de l'État* (Paris, Lahure, 1903; 127 pp.) — together with an appendix explaining the genesis of this constitution. Both are excellent pieces of work. A second part,

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setting forth the constitutional guaranties of private rights, will appear shortly.

A detailed comparison of the position and powers of the executive heads of the two most important federal governments in the modern world is given in Rudolph Steinbach's *Die rechtliche Stellung des deutschen Kaisers verglichen mit der des Präsidenten der Vereinigten Staaten von Amerika* (Leipzig, Rossberg, 1903; 149 pp.). The comparison is suggestive because it brings out in a striking way the similarity of the two offices in all important respects except title and tenure. It might seem to justify Frary's over-clever remark that the United States is really a monarchy with an elective king; but Steinbach rightly insists upon the opposite view, that the German emperor is not "*Reichsmonarch*" but "*Organ des Reiches.*"

Among the latest publications in the *Johns Hopkins University Studies* is an essay on *White Servitude in Maryland*, by Eugene Irving McCormac. In eight chapters Mr. McCormac discusses thoroughly and satisfactorily such subjects as the number and importance of servants in Maryland, their conditions under indentures and under the "custom of the country," fugitive servants, the status of servants and freedmen and the enrollment of servants in the militia.

M. André E. Sayous, who promises some day to write a work on the Far West, gives his impressions of Wyoming in a little monograph entitled *Le Wyoming* (Paris, Larose, 1904). The description of the natural resources of the state is interesting, if not containing much that is new. More entertaining is the discussion of social and political conditions. If we are to trust our author, Wyoming is owned by the Union Pacific, which practically appoints the governor of the state and prescribes ordinary legislation. Masked men parade the streets of the towns and plunder pedestrians at will; unpopular citizens are hanged or burned alive; immemorial custom dictates that any man who is arrested shall shoot the sheriff on regaining his liberty. And the best people, not only of Wyoming, but of the far West generally, are the Mormons.

In his *Les états-Unis au xx^e^ siècle* (Paris, Armand Colin, 1904; 469 pp.), M. Pierre Leroy-Beaulieu gives a succinct account of the present economic condition of the United States. The work is almost purely statistical and draws its data chiefly from the volumes of the twelfth census, although other sources, such as the statistical abstracts of the United States and the reports of the Interstate Commerce Commission, are employed to supplement the census reports. The work, as one would expect, is thorough-going and scholarly, and presents a clearer view of the American industrial situation than any other of the

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numerous works on America published abroad. The American reader, however, would have found the work more instructive if more space had been devoted to a comparative study of the United States and its principal foreign competitors.

The recent increase in American export trade and the consequent development of the business of foreign exchange have created a need, on the part of both practical men and economic students, for a clear presentation of the technique of international exchange. Mr. A. W. Margraff's *International Exchange* (Chicago, Geo. E. Marshall & Co., 1904) supplies this need in a very satisfactory way. The author is a man of practical experience in this line, and displays his thorough familiarity with all the details of the business. Although the bulk of the work is devoted to a description of the practical features of the exchange department of the modern bank, the author handles the theoretical aspects of the subject in a masterly manner.

The Guide to the Archives of the Government of the United States at Washington, compiled by C. H. Van Tyne and W. G. Leland, and published by the Carnegie Institution at Washington, 1904, will prove most helpful to all students who have occasion to use the documents at the national capital. A general but comprehensive description is given of the collections in the public offices and in the library of Congress and of those in the custody of the supreme court, the court of claims and the Smithsonian Institution.

The Education of the Wage Earner, by the late Thomas Davidson (Boston, Ginn & Co., 1904) is a book that will be read with interest by the political scientist as well as by the educator. It consists of an introduction by Professor Charles M. Bakewell, giving a brief biography of the author and an analysis of his philosophy; two essays by Thomas Davidson setting forth in a broad way the educational needs of the masses; a third essay recording the history of an educational club founded, by Davidson among the Jews of the lower East Side; and the correspondence between Thomas Davidson and members of the club. In the view of that great scholar and philanthropist, a genuine republic is impossible without universal higher education. Such education, while emphasizing the paramount importance of culture, should go hand in hand with technical and professional training.

Dr. N. I. Stone's translation of Marx's *Critique of Political Economy* (New York, The International Publishing Co., 1904) makes available for English readers a work which merits more attention than it has hitherto received. The translation has been done with great thoroughness; the book is probably more readable in the translation than it was

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in the original. Marx's introduction to the *Critique*, published posthumously in the *Neue Zeit*, is given in the appendix, appearing here for the first time in book form. It is to be hoped that Dr. Stone's painstaking work may receive from students of economics the appreciation it merits.

Socialism and Individualism, by E. Belfort Bax and J. Hiam Levy (London, P. S. King & Son; 155 pp.) is a revision of some popular lectures delivered by the authors in defence of socialism and individualism respectively. The net result of the lectures is as profitable as one could expect from a debate between a socialist and a single-taxer, neither of whom understands the other's point of view. The most interesting part of the book is Bax's lecture on socialism; the weakest part is his attempt to establish, in fifteen pages, the obsolete Marxian theory of value.

Il sentimento giuridico, by Dr. Giorgio del Vecchio (Turin, Fratelli Bocca, 1902; 18 pp.), sets forth in brief compass the principal philosophical theories and his own views regarding the origin and significance of the sense of justice. Affirming that, in germ at least, it forms part of the original endowment of man, and rejecting the view that it is wholly a product of social evolution, the author also opposes the theory, which he ascribes to the historical jurists, that the popular sense of right is "the undisturbed, simple and all-powerful cause" of positive law. In *La dichiarazione dei diritti dell' uomo e del cittadino nella rivoluzione francese* (Genoa, Tipografia della Gioventù, 1903; 93 pp.), Dr. del Vecchio discusses the connection between the French declaration of rights and the Revolution, the historical and philosophical antecedents of the declaration in France, its various forms in the successive stages of the Revolution, the criticisms of the declaration in England, Germany and France, its influence on modern history and its significance in the modern state. In a more extensive treatise which he hopes soon to publish, he proposes to consider the antecedents of the French declaration in the American bills of rights, and its deeper relation to the social contract theory as formulated by Rousseau. He apparently does not intend to examine the connection between these antecedents and the earlier social contract theories and bills of rights in England, asserting (pp. 50, 51) that there is a substantial distinction between the English declarations of the rights of English subjects and the American and French declarations of the rights of men in general.

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